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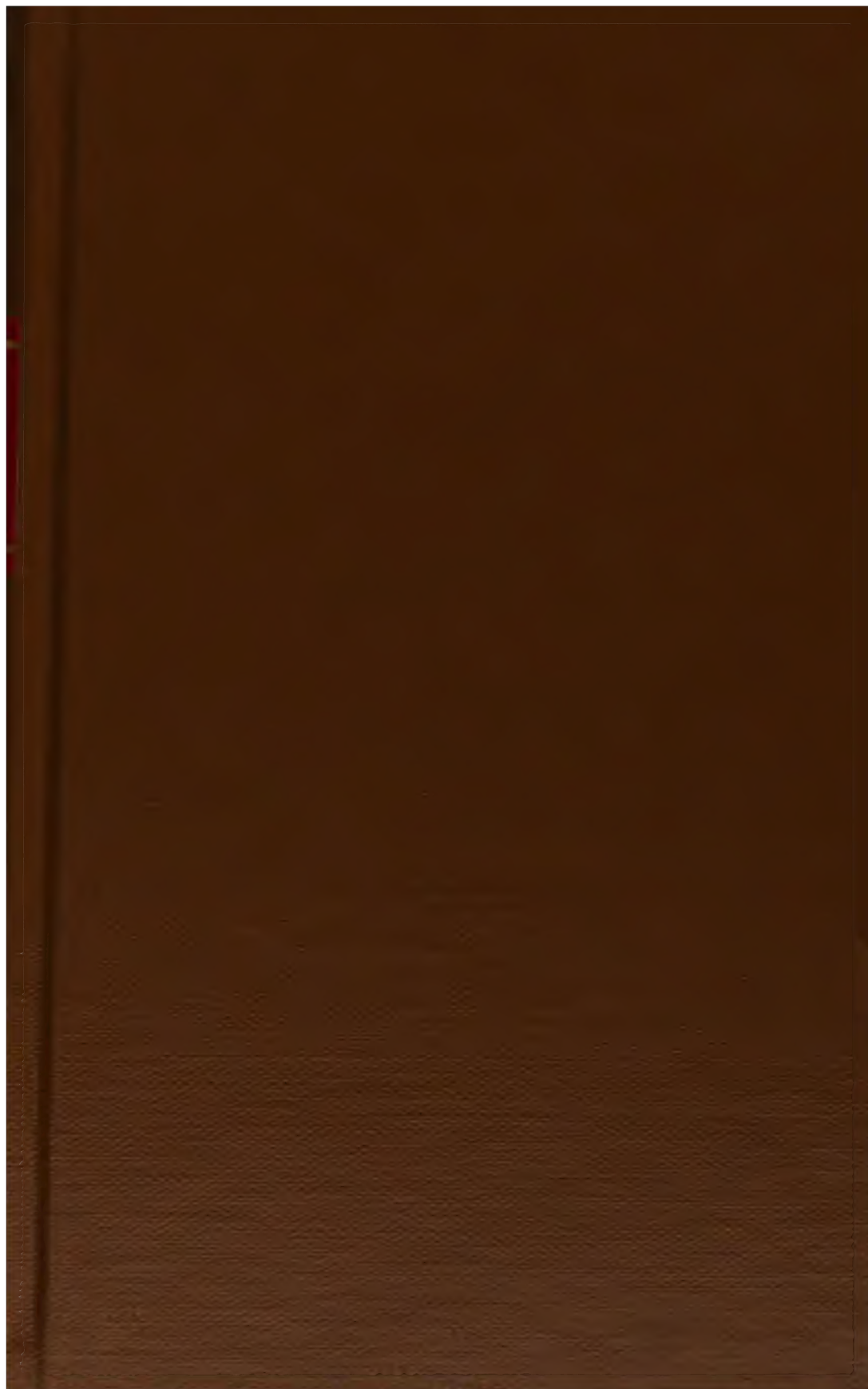
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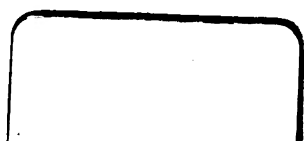
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# COMMON BENCH REPORTS.

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CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

EASTER, TRINITY, AND MICHAELMAS TERMS, 1852.

WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED, AND OF  
THE PRINCIPAL MATTERS.

---

BY

JOHN SCOTT, ESQ.,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

---

VOL. XII.

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1854.



**JUDGES**  
**OF**  
**THE COURT OF COMMON PLEAS,**  
**DURING THE PERIOD OF THESE REPORTS.**

---

**The Right Hon. Sir JOHN JERVIS, Knt., Lord Chief Justice.**

**The Hon. Sir WILLIAM HENRY MAULE, Knt.**  
**The Hon. Sir CRESSWELL CRESSWELL, Knt.**  
**The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.**  
**The Hon. Sir THOMAS NOON TALFOURD, Knt.**

---

**ATTORNEY-GENERAL.**

**Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.**


---

**SOLICITOR-GENERAL.**

**Sir WILLIAM PAGE WOOD, Knt.**



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CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS  
AND IN THE  
EXCHEQUER CHAMBER,

IN  
Hilary Vacation,

IN THE  
FIFTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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STEPHEN CANNON, Demandant; WILLIAM BALLANTINE  
RIMINGTON, Tenant. *Feb. 9.*

An estate-tail having been discontinued by a feoffment made by the tenant-in-tail more than twenty years before his death,—Held, that the issue in tail might bring his writ of formedon at any time within twenty years next after such death,—the period of limitation prescribed by the statute 3 & 4 W. 4, c. 27, not running against him during the life of the tenant-in-tail.

THIS was a writ of formedon in the descender. The count was as follows:—

Cumberland, to wit: Stephen Cannon, the demandant in this suit, by W. S., his attorney, demands against William Ballantine Rimington ten messuages and five acres of land, with the appurtenances, in the parish of Penrith, in the county of Cumberland, which Stephen Cannon, the grandfather of the demandant, gave to Stephen Cannon, the father of the demandant, and the heirs of the body of the said Stephen Cannon, the father of the demandant; and which, after the death of Stephen Cannon, the father of the demandant, ought to descend to the demandant, the son and heir of the said Stephen Cannon, the father, according to the form of \*the said gift: And thereupon the said demandant saith [\*2 that the said Stephen Cannon, the grandfather of the demandant,

hereinbefore mentioned, heretofore, to wit, on the 30th of November, 1796, was seised of and in the tenements aforesaid, with the appurtenances, in his demesne as of fee, and being so seised thereof, afterwards, and before the 1st of January, 1888, to wit, on the day and year last aforesaid, duly made and published his last will and testament in writing, signed by him, and attested and subscribed in his presence by three credible witnesses, according to the form of the statute in such case made and provided, *and thereby, according to the said statute, devised and gave to the said Stephen Cannon, the father of the demandant, and the heirs of the body of him the said Stephen Cannon, the father,* the tenements aforesaid, with the appurtenances; and the said Stephen Cannon, the grandfather of the demandant, after his said will had been and was so made and published as aforesaid, and before he had in any wise revoked or altered the same, or the same had become or was in any wise revoked or altered, departed this life so seised as aforesaid, to wit, on the 18th of April, 1797, leaving the said Stephen Cannon, the father of the demandant, him surviving, who, thereupon, then, by virtue of the said gift, became and was seised of the said tenements, with the appurtenances, in his demesne *as of fee-tail, to wit, to him and the heirs of his body,* in the time of peace, in the time of George the Third late King of England, by taking the explees thereof to the value of 10*l.*: And the said Stephen Cannon, the father, afterwards, and before this suit, and within twenty years next before the commencement of this suit, to wit, on the 29th of April, 1831, departed this life, leaving his son and heir of his body, Stephen Cannon, the demandant, him surviving; whereupon the right to the said tenements, with the appurtenances, according to the form of the said gift, descended from \*3] *the said Stephen Cannon the father, to, and now remaineth, and* ought to remain, in, the said demandant, as tenant-in-tail, according to the form of the said gift, as son and heir of the body of the said Stephen Cannon, the father; for that the said Stephen Cannon, the father, died as aforesaid, leaving the said Stephen Cannon, the demandant, the son and heir of his body, him surviving, &c.

Pleas,—first, that the said Stephen Cannon, the grandfather of the demandant, did not devise or give to the said Stephen Cannon, the father, the said tenements, with the appurtenances, or any of them, or any part thereof, in manner and form as the demandant had in his said writ and count supposed,—concluding to the country.

Secondly,—that the right, title, and cause of action in the writ and count above mentioned, did not first descend or accrue within twenty years next before the suing and bringing of the writ whereby this action was commenced,—verification, and prayer of judgment if, &c.

Thirdly,—that, after the said Stephen Cannon, the father of the demandant, became and was seised of the said tenements, with the appurtenances, as in the count is above alleged, and twenty years and

more before the commencement of this action, to wit, on the 31st of January, 1798, to wit, at, &c., he the said Stephen Cannon, the father of the demandant, discontinued the possession of the said tenements, with the appurtenances, and the receipt of the profits thereof, and of every part thereof; and that, from the said time when the said Stephen Cannon, the father of the demandant, so as aforesaid discontinued the said possession of the said tenements, with the appurtenances, and the receipt of the profits thereof as aforesaid, he, the said Stephen Cannon, the father of the demandant, in the lifetime \*of the said Stephen Cannon, the father, was not, nor, after the death of the said [\*4 Stephen Cannon, the father, was the said Stephen Cannon, the demandant, in possession of the said tenements, with the appurtenances, or any part thereof, or in the receipt of the profits of the said tenements, with the appurtenances, or any of them, or any part thereof,—verification, and prayer of judgment if, &c.

The demandant joined issue on the first plea, and replied to the second,—that the said right, title, and cause of action did first descend and accrue within twenty years next before the suing and bringing the writ whereby this action was commenced; and, to the third,—that the said Stephen Cannon, the father of the demandant, after he became, and whilst he was, so seised of the said tenements in the said count mentioned, with the appurtenances, as therein mentioned, and before he had in any wise discontinued the possession of the said tenements, with the appurtenances, or any of them, or of any part thereof, as in the third plea mentioned, and before he had discontinued the receipt of the rents and profits of the said tenements, with the appurtenances, or any part thereof, to wit, on the 31st of January, 1798, to wit, at, &c., enfeoffed, to wit, one William Drewry Rimington, of the said several tenements, with the appurtenances, to have and to hold the same, to wit, unto the said W. D. Rimington, his heirs and assigns, for ever; and the said W. D. Rimington, afterwards, to wit, on the day and year last aforesaid, entered into the said several tenements, with the appurtenances, and became and was seised and possessed thereof: And the demandant in fact said, that, upon such feoffment being so made as aforesaid, and by virtue thereof, to wit, on the day and year last aforesaid, at, &c., aforesaid, the estate-tail of and in the said several tenements, with the appurtenances, so devised and given to the said Stephen \*Cannon, the father of the demandant, and the heirs of [\*5 the body of the said Stephen Cannon, the father, as in the count mentioned, became and was discontinued, and so remained discontinued as aforesaid, until and upon the day of the death of the said Stephen Cannon, the father of the demandant, and until and upon the 1st of June, 1835, and until the commencement of this suit: And the demandant in fact said that the said Stephen Cannon, the father of the demandant, departed this life within twenty years next before the

suings of the writ whereby this action was commenced, and before the 31st of December, 1833, to wit, on the 29th of April, 1831; and thereupon the right to the said tenements, with the appurtenances, according to the form of the said gift, descended from the said Stephen Cannon, the father of the demandant, to the said demandant, as tenant-in-tail, according to the form of the said gift, to wit, as heir of the body of the said Stephen Cannon, the father of the demandant: And the demandant further said, that, at the time when the said right so descended unto him as aforesaid, the right of entry of him the said demandant to and in respect of the tenements in the said count mentioned, with the appurtenances, had been and was taken away, to wit, by such discontinuance of the said estate-tail as in this replication aforesaid, and so remained and continued taken away as aforesaid thence continually until and upon the 1st of June, 1835: And the demandant in fact said, that, on the 1st of June, 1835, he, the demandant, was entitled to bring and maintain, and might on that day have brought and maintained, an action of formedon in descender in respect of the tenements in the count mentioned, with the appurtenances, and for the recovery thereof; and the said demandant so remained and continued entitled to bring and maintain the same action thence continually until the suing of the writ whereby this action \*6] was commenced: And the demandant further \*said that the said Stephen Cannon, the father, in his lifetime, never at any time from and after the said time when the said Stephen Cannon, the father of the demandant, so enfeoffed the said W. D. Rimington as in this replication aforesaid, was seised or possessed of, or entitled to, the said tenements, with the appurtenances, or any part thereof, or any estate or interest therein, and, from and after that time, never was entitled to receive, and never received, the rents and profits thereof, or any part thereof,—and this the demandant was ready to verify, wherefore he prayed judgment and seisin of the said several tenements, with the appurtenances, to be adjudged to him, &c.

The defendant joined issue on the replication to the second plea, and demurred generally to the replication to the third plea,—the point marked in the margin being,—“A cause of demurrer, is, that the feoffment and discontinuance alleged in the replication, does not deprive the tenant of the protection of the statute of limitations, 3 & 4 W. 4, c. 27.”

*Hugh Hill* (with whom was *Unthank*), in support of the demurrer.—The question for the consideration of the court, is, whether, upon the facts appearing on this record, the limitation prescribed by the statute 3 & 4 W. 4, c. 27, bars the right of the demandant to bring his writ of formedon. In *Doe d. Cannon v. Rucastle*, 8 C. B. 876, this court held, that the devise under which Stephen Cannon, the father of the demandant, took, gave him an estate-tail, and that, the estate-tail

having been discontinued by the feoffment more than twenty years before the commencement of the action, the demandant could not recover in ejectment. The argument will turn mainly upon the 2d, 3d, 21st, 22d, 37th, and 38th sections of the 3 & 4 W. 4, c. 27.

The 2d section enacts, "that, after the 31st of \*December, [\*7 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." The 3d section enacts, "that, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, whilst entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received," &c. The 21st section enacts, "that, when the right of a tenant-in-tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant-in-tail might lawfully have barred." The 22d section enacts, "that, when a tenant-in-tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore \*limited, which shall be applicable in such [\*8 case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant-in-tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant-in-tail had so long continued to live, he might have made such entry or distress, or brought such action." The 37th section enacts, "that when, on the said 31st of December, 1834, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as afore-said, in respect of such land, such writ or action may be brought at any time before the 1st of June, 1835, in case the same might have



been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired." And the 38th section enacts, "that, when, on the said 1st of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st of June, 1835, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

The facts disclosed upon this record, are,—that, after the first tenant-in-tail became seised in tail, and more than twenty years ago, he made a feoffment, and so discontinued the fact of the possession, and the feoffee has ever since been in possession of the land, and in receipt of the rents and profits. The question is, whether, upon that state of facts, the issue in tail is barred of his writ of formedon. It is submitted \*9] that he is. Before the \*passing of the act, the tenant-in-tail might have barred the issue in tail by a fine, with proclamations, under the 32 H. 8, c. 36, s. 1. If there had been no feoffment in this case, but only a simple discontinuance in fact of the possession and receipt of the rents and profits, the issue in tail would have been barred, under section 21, if the whole twenty years had run out in the lifetime of the tenant-in-tail, or, under section 22, he would have had only so much of the twenty years as remained unexpired at the death of the tenant-in-tail. If that be so, how is the issue in tail in a better position because the tenant-in-tail has executed a feoffment? In Tolson, dem., Kaye, ten., 3 B. & B. 217, 6 J. B. Moore, 542, it having been urged in argument that the old statute of limitations, 21 Jac. 1, c. 16, s. 1, ought to be construed strictly,—Dallas, C. J., said: "I cannot agree in the position that statutes of this description ought to receive a strict construction: on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are, 'for quieting of men's estates, and avoiding of suits.' It is therefore that this statute and all others of this description, are termed by Lord Kenyon statutes of repose; and long before and since the passing of this statute that has been the principle which has guided the courts in the construction of them." The 3 & 4 W. 4, c. 27, carries that intention further than the former statutes: by those, the remedy only was barred; but, under this statute, the title is absolutely extinguished,—s. 34.

*Willes* (with whom was *Spinks*), contrà.—The demandant claims as the issue in tail, whose right of action has not been barred by any conveyance his ancestor has made. But for the statute De Donis, 13 Edw.

1, c. 1, \*the feoffment would have been a good conveyance: but, by that statute, there being issue in tail, its only effect was, [\*10 to turn their right of entry into a right of action. The real question is, whether the statute 3 & 4 W. 4, c. 27, has taken away the right of the issue in tail to bring his action, under the circumstances disclosed upon this record. It is clear that the issue in tail was not barred under the 21 Jac. 1, c. 16: it is so laid down in Watkins on Conveyancing, 9th edit. p. 401, n. How is it under this statute? By the 36th section, real and mixed actions (with certain exceptions), and, amongst the rest, writs of formedon, are abolished from the 31st of December, 1834; provided (s. 37) "that, when, on the 31st of December, 1834, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid, in respect of such land, such writ or action may be brought at any time before the 1st of June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired." Then comes the 38th section, which provides, "that, when, on the said 1st of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st of June, 1835, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away." It may be conceded, that, if the 21st and 22d sections had not been in the act, the time for the demandant to have brought his formedon would have been within twenty years after the death of the tenant-in-tail. The general rule of prescription is expressed in the maxim, \*"*Contra non valentem agere non currit præscriptio*." It would be [\*11 manifestly absurd to make the prescription run against a person who is excluded by his own act from doing anything during the time limited. Here the tenant-in-tail was excluded by his conveyance: there was no period "hereinbefore limited," for, there was no discontinuance until after the tenant-in-tail had parted with his right,—so that the period of limitation never began to run. The 22d section, upon which the main reliance is placed on the other side, applies to the case of tenant-in-tail of land or rent *entitled to recover the same*. Here, the demandant's father was not a person in that position, nor did he die before the expiration of the period "hereinbefore limited." The action is to be brought only within the period during which, by virtue of the provisions of the act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away. Sir Edward Sugden, in his essay upon this statute, edit. 1852, p. 89, says: "When the right of a

*tenant-in-tail* has been barred by reason of the entry, distress, or action not having been made or brought within the period before limited, no such entry, distress, or action can be made or brought *by any person claiming any estate, interest, or right which such tenant-in-tail might lawfully have barred* (s. 21). And when a *tenant-in-tail* has died before the expiration of the period before limited, *no person claiming any estate, interest, or right which such tenant-in-tail might lawfully have barred*, can make an entry or distress or bring an action, but within the period during which, if such *tenant-in-tail* had so long continued to live, he might have made such entry or distress or brought such action (s. 22). These were reasonable provisions. The neglect of the *tenant-in-tail* will bar all those,—issue in tail and remainder-men,—whom the *tenant-in-tail* himself might have barred, and, if the \*whole time has not

\*12] run against him, the persons, issue or remainder-men, whom he could have barred, have only the time which remains to run, within which to prosecute their right; and, thus claiming, as it were, to stand in his place, they cannot claim the benefit of the savings in the act in regard to their own disabilities." The 21st and 22d sections are pure clauses of limitation: they do not apply to validate invalid conveyances; that is done, in a very guarded manner, by section 23. This series of sections has no application to the case of a *tenant-in-tail* who has executed a feoffment. Assuming, then, that the case is not governed by sections 21 and 22, we are thrown back upon sections 2 and 3. The 2d section is entirely in favour of the issue in tail: it enacts, "that, after the 31st of December, 1833, no person shall make an entry or distress, or bring an action, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." It may be admitted, for the purpose of this argument, that the issue in tail is a person claiming *through* the *tenant-in-tail*, for the purposes of this act.(a) It was at one time supposed that the 3d section expresses

\*13] all the cases which are embraced by the \*2d. The point arose upon the claim of an annuitant under a will, who had never received any payment. It was at first held,—*James v. Salter*, 2 N. C. 505, 2 Scott, 750,—that the right was not barred by the lapse of twenty years. It was observed that no annuity can be recovered, by the 2d section, unless within twenty years after the right of action accrued, but that section must be construed by the 3d, which explains what is

(a) The interpretation clause, s. 1, enacts that, "the person through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, *issue in tail*, tenant by the curtesy of England, tenant in dower, successor, special, or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise," &c.

meant by the words "when the right shall first have accrued;" but the case did not fall within either of the two first conditions, and not within the third, because gifts by will are expressly excepted. This construction however, was, upon further consideration, abandoned; and it was held,—James v. Salter, 3 N. C. 544, 4 Scott, 168,—that the 2d section contemplates and provides for the case where the right or title to the annuity itself is disputed; and the object of the 3d, is, to explain and give a construction to the enactment contained in the 2d clause, as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the 2d section, but is not included amongst the instances given by the 3d, to be governed by the operation of the 2d. This second phase of James v. Salter seems to have been universally approved: see Sugden's Essay, edit. 1852, p. 85; Hayes on Conveyancing, 5th edit., Vol. 1, p. 253. The first branch of the 3d section enacts, "that, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued," as follows,—“when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such \*rent, and shall, *while entitled thereto*, have been dispossessed, or have [\*14 discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.” The third plea seeks to bring this case within that provision. The answer to that upon the record, is, that, before the tenant-in-tail discontinued the possession of the land, he executed a feoffment, and, from that time down to the time of his death, remained out of possession and out of the receipt of the rents and profits. That branch of the section applies to the case of one who, *being entitled*, is dispossessed, or abandons the possession. This is the construction put upon the statute by Sir L. Shadwell, in Jumpsen v. Pitchers, 13 Simons, 327, explaining a previous case of Doe d. Corbyn v. Bramston, 3 Ad. & E. 63 (E. C. L. R. vol. 30).(a)

*Hill*, in reply, referred to the argument of Mr. Hodgson, in Doe d. Daniell v. Woodroffe, 10 M. & W. 624,† where he says,—“The base-fee acquired by the innocent assurance of a tenant-in-tail, is not an estate *adverse* to the estate-tail, but rather an estate in the nature of a *long lease*, to be fed out of the estate-tail, and leaving in the issue in tail something of the same character as a reversion upon a long lease, and more than a mere right of entry. It cannot be said that there is in

(a) S. C. per nom. Doe d. Corby v. Branson, 4 N. & M. 664. See the observations upon this case, in Sugden's Essay, p. 87.

such a case any interruption of the seisin, as there would be by a feoffment. It would be a strange construction to say, that, when a party has covenanted to stand seised to the use of another, that other can allege that the deed operated as a disseisin, or interruption of the seisin, of the very person who by his covenant was to retain the estate \*15] for the \*other's benefit. The possession under such an instrument is not adverse, as Lord Holt says, in *Machell v. Clarke*, 2 Lord Raym. 778, 2 Salk. 619, 7 Mod. 18, it does no prejudice to the issue, for, they have only to enter to defeat it: it does not put them to their formedon, and their right to enter is in no wise barred. The statute of James, indeed, took away the *remedy by action*; but the *right* was not affected until the recent statute of 3 & 4 W. 4, which declares, that, for the future, when the remedy is gone, the right shall cease also." *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court.

This case turns upon the true construction of certain sections of the statute 3 & 4 W. 4, c. 27. The estate-tail having been discontinued by the feoffment mentioned in the pleadings more than twenty years before the death of the tenant-in-tail, the question is, whether the issue in tail can have his writ of formedon within twenty years next after the death of the tenant-in-tail, or whether the period of limitation is to run against him during the life of the tenant-in-tail. We are of opinion that the former is the true construction of the act, and that the demandant is entitled to our judgment.

The 38th section enacts "that when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not \*16] been so taken away." The time within which \*an entry might have been made, if the right of entry had not been taken away, is governed by previous sections,—the 2d, the 3d, and 21st sections. Mr. Hill contends that the 21st section is applicable to this case; and, no doubt, as he says, if the tenant-in-tail had voluntarily abandoned his interest during his life, and had remained out of possession for twenty years, the issue in tail would have been barred: but, although there may be an apparent hardship in the case, and a difficulty in understanding why in principle such a distinction should exist, we are of opinion that the 21st section does not apply to this case, and that the right of a tenant-in-tail to make an entry or bring an action to recover the land, cannot be barred by reason of the same not having been made or brought, in a case where the tenant-in-tail has conveyed away his own

right, and has put it out of his power to make an entry or bring an action.

The same view of the case shows that this case does not come within the first alternative of the 2d section, or the first branch of the 3d section. The demandant cannot say that he claims *per formam doni*, and not through the tenant-in-tail; for, the interpretation clause concludes that question. The issue in tail, therefore, claims through the tenant-in-tail; but the tenant-in-tail, having determined his right by his own conveyance, had not during his life a right to make an entry or bring an action to recover the land; and therefore the time would run only from the death of the tenant-in-tail. It is contended, however, that the first branch of the 3d section comprehends this case: but, in our opinion, this is not so; for, by executing the conveyance, the tenant-in-tail ceases to be entitled, and cannot therefore be said to have discontinued his possession while entitled thereto. It is unnecessary, after the decision in *James v. Salter*, to consider whether in strictness this case falls \*within the fourth branch of the 3d section, or the second alternative of the 2d section; for, in either case, the demandant [\*17 will succeed.

The view which we have thus taken of the statute was very forcibly presented by Mr. Willes in his argument; was suggested by Sir Edward Sugden, in his valuable work on Vendors and Purchasers, 11th edit. p. 616, and adopted by Mr. Smith in his note to *Taylor v. Horde*, 2 Smith's Leading Cases, 406 a.

It is said, however, that, whatever may be the effect of an innocent conveyance, a feoffment, which works a discontinuance, admits of a different consideration. This certainly will not be so hereafter, by operation of the 39th section; nor do we think that it is so in the present case. Before the late statute, an innocent conveyance by tenant-in-tail in his lifetime put the issue in tail to his entry upon the death of the tenant-in-tail, and a tortious conveyance which discontinued the estate put him to his writ of *formedon*. But, in both cases, the right first accrued after the death of the ancestor. Since the statute, in cases where the real action is allowed, the time is to be calculated by the 38th section, not with reference to the form of proceeding, but as if the demandant, instead of maintaining a real action, had a right of entry, and the right of entry had not been taken away by the discontinuance. This, therefore, for the purpose of limitation, makes the feoffment an innocent conveyance. It takes away the right of entry, and puts the demandant to his *formedon*; but the *formedon* is to be brought within the same time as an *ejectment* would have been maintainable, if the right of entry had not been taken away.

For these reasons, we are of opinion that the demandant is entitled to judgment.

Judgment for the demandant.

## \*18] \*IN THE EXCHEQUER CHAMBER.

RIMINGTON v. CANNON. May 30, 1853.

Account in formedon in the descender stated, that A., being seised of lands, on the 30th of November, 1796, devised the same to B. and the heirs of his body; that A. died seised, without revoking his will, leaving B. surviving; and that B. died within twenty years next before the commencement of the suit, leaving C., the demandant, his son and heir, surviving.

The defendant pleaded,—that the right, title, and cause of action in the writ and count mentioned, did not first descend or accrue within twenty years next before the suing out the writ,—and that, after B. was seised, and twenty years and more before the commencement of the action, viz., on the 31st of January, 1798, B. discontinued the possession of the tenements aforesaid, and the receipt of the profits thereof, and that, from that time, neither B. nor the demandant was in possession of the said tenements, or the receipt of the profits thereof.

To the last plea the demandant replied, that B., whilst seised of the tenements, and before the discontinuance of the possession thereof, or the receipt of the rents and profits, viz., on the 31st of January, 1798, enfeoffed one D. (the father of the defendant) of the said tenements, to hold in fee, and that thereby the estate so devised to B. was discontinued until the death of B., and until the 1st of June, 1835, and until the commencement of the suit, and that B. died within twenty years before the commencement of the suit, and before the 31st of December, 1833, viz., on the 29th of April, 1831; and, further, that, on the 1st of June, 1835, the demandant was entitled to maintain an action of formedon in the descender in respect of the said tenements, and so remained until the suing out of the writ; and that B. never at any time after the enfeoffment was seised or possessed of or entitled to the tenements, or to receive, and never did receive, the rents and profits thereof:—

Held,—affirming the judgment of the Court of Common Pleas on a demurrer to the replication to the last plea,—that the issue in tail of B. was entitled to bring his formedon within twenty years after B.'s death; the discontinuance of possession in the 3d section of the 3 & 4 W. 4, c. 27, being, the ceasing to possess when the party so ceasing had a right to possess, which B. could not have, after he had conveyed his estate to the feoffee.

By his will, A. devised certain freehold and personal property to trustees (whom he also named executors) for payment of debts and legacies; and, in the event of the property so devised being insufficient for that purpose, he devised all other his messuages, &c., to the same trustees, in trust to sell the same to satisfy the debts and legacies, and to divide the residue, if any, amongst all his children,—“Provided, that, in case my personal estate and my lands, &c., herein first above devised, shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son B., my dwelling-house, lands, &c., in F., for and during the term of his natural life,” remainder to his issue, and, in default of issue, to the testator's heir or heirs at law:—

Held, that the will gave B. an estate-tail in the lands in F.; and that the devise was not void for remoteness, by reason of its being postponed till after payment of debts; but that, inasmuch as the estate was given to B., not absolutely, but only in the event of the estate first devised to the trustees proving sufficient for the payment of debts, the allegation in the count, which imported an absolute devise to B., was not proved.

THIS was a writ of formedon in the descender. See the pleadings, *antè*, p. 1.

The Court of Common Pleas having given judgment for the demandant upon the demurrer to the \*replication to the third plea, the  
\*19] issues of fact came on for trial, before Cresswell, J., at the Spring Assizes for the county of Cumberland in 1852.

On the part of the demandant, it was proved, that Stephen Cannon, the grandfather of the demandant, on the 30th of November, 1796, being then seised in fee of the tenements, with the appurtenances, as in the count mentioned, made his will, duly executed and attested so as to pass real estates, as follows:—

"This is the last will and testament of me Stephen Cannon, the elder, of Penrith, in the county of Cumberland, butcher: I give, devise, and bequeath unto my two friends, John Williamson, of, &c., and Edmund Bowman, of, &c., all my stock of cattle, horses, and sheep, and all my corn, hay, and straw, and my husbandry gear, and articles used in husbandry, whatsoever, and all my lands in Barco and Scaw, with the buildings thereon, situate in the parish of Penrith aforesaid, To hold the same to the said John Williamson and Edmund Bowman, their heirs and assigns, upon the following uses and trusts, that is to say, upon trust to sell and dispose thereof by public auction, and, by and with the money arising therefrom, to pay and discharge all my just debts, the legacies hereinafter named, and my funeral expenses, and the residue to pay unto my daughter Catherine Cannon: Provided that, in case such residue shall exceed the sum of 100*l.*, then I order and direct the said John Williamson and Edmund Bowman to pay 20*l.* to my son Stephen Cannon out of such residue, and the remainder to my daughter Catherine, first deducting all the expenses paid by the said John Williamson and Edmund Bowman, in, about, and concerning the trusts hereby in them reposed, and the sum of 5*l.* each as a compensation for their trouble: And, in case it shall so happen, that, upon sale of my real and personal estate hereinbefore devised as aforesaid, the same shall be insufficient for the payment \*of all my just debts and funeral expenses, then and in such case I give and devise [\*20 unto the said John Williamson and Edmund Bowman, their heirs and assigns, all and singular other my messuages, lands, and tenements whatsoever, to be by them sold and disposed of until my just debts and funeral expenses shall be fully paid and satisfied; and the residue thereof, in case it shall be necessary to put this last devise in execution, but not otherwise, I order and direct shall be paid and divided equally amongst all my children: Provided, that, in case my personal estate, and my lands, tenements, and real estate herein first above devised shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son Stephen my dwelling-house, butchering-shop, stable, and byre in Fryar Gate, and all my butchering utensils; also a small field at Freeridge Head, and all that dwelling-house, barn, and granary, on the east side of Fryar Gate aforesaid, To hold to my said son Stephen Cannon, for and during the term of his natural life; and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs at law: Provided always, and I do hereby further direct, that, if the purchaser or purchasers of my said real estate so as aforesaid devised to be sold, shall require that my said son Stephen shall join with the trustees aforesaid in the conveyance or conveyances



thereof, and he shall refuse to execute the same to such purchaser or purchasers, then and in such case I revoke and disannul the aforesaid devise to my son Stephen of the aforesaid houses and lands, and do give and devise the same to my daughter Catherine, her heirs and assigns, for ever: And I do further order and direct that my said son \*21] \*Stephen shall not be entitled to the possession of my dwelling-house, butchering-shop, and outhouses, until the expiration of three calendar months from my decease: I give and devise unto my daughter Susan my messuage and tenement in Fryar Gate aforesaid, late Sawrey's, now in the occupation of several tenants, To hold the same to the said Susan, and her assigns, for and during the term of her natural life; and, from and after her decease, then I give and devise the same to the child or children of the said Susan lawfully begotten, or their lawful issue, in case she shall leave any such child or children, or their issue, at the time of her decease, equally amongst them, if more than one, share and share alike, and to their heirs and assigns, for ever; and, for default of such issue, then I give and devise the same to my heir or heirs-at-law: I give and devise to my said daughter Catherine, her heirs and assigns, for ever, all my lands and tenements situate at Newbiggin, or in the town-fields thereof: I also give and bequeath unto my wife and my said daughters Susan and Catherine all my household goods and furniture in my dwelling-houses in Penrith and Newbiggin aforesaid, to be equally divided between them: And, lastly, I nominate and appoint the said John Williamson and Edmund Bowman *executors* of this my last will and testament, hereby revoking all former wills."

Evidence was then given on the part of the demandant, that Stephen Cannon, the testator, died seised of the premises in question, on the 21st of April, 1797, leaving Stephen Cannon, the father of the demandant, called in the will "my son Stephen," him surviving; and that, on the 31st of January, 1798, Stephen Cannon, the father of the demandant, made a feoffment to William Drewry Rimington, in the following terms:—

"This indenture, made the 31st of January, 1798, between Stephen \*22] Cannon, of, &c., of the one part, and \*William Drewry Rimington, of, &c., of the other part, witnesseth, that, for and in consideration of 85*l.* to the said Stephen Cannon paid, &c., the said Stephen Cannon hath granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, &c., unto the said W. D. Rimington, his heirs and assigns, all that his the said Stephen Cannon's close or parcel of land called the Friarage Head, together with all and singular lands, meadows, &c., and appurtenances whatsoever to the said close or parcel of land belonging, &c., and the reversion and reversions, &c., and all the estate, &c., habendum to the said W. D. Rimington, his heirs and assigns, to the only proper use and behoof of the said W. D. Rimington, his heirs and assigns, for ever," &c.

Evidence was then given, that the indenture, with the endorsement of livery of seisin thereon, came out of the custody of the tenant, and were respectively thirty years old; that the lands in the indenture mentioned were the same lands and premises in the will of Stephen Cannon the grandfather mentioned, and the lands and premises in the count mentioned; that livery of seisin was duly given at the date of the feoffment; and that Stephen Cannon the father was in possession at the time of the feoffment.

It was further proved that Stephen Cannon, the father of the demandant, died on the 29th of April, 1831, leaving the demandant, his eldest son, him surviving; and that the writ of formedon was issued on the 28th of March, 1851.

The learned judge directed the jury, that the devise and gift alleged in the count to be a devise and gift to Stephen Cannon, the father of the demandant, and the heirs of his body, was proved by the said will; and that the action had been brought in time.

To this ruling the demandant's counsel excepted; \*and the exceptions and the judgment of the court below were now brought [\*23 by writ of error to the Exchequer Chamber.

The case was argued in Michaelmas Vacation, 1852, before Parke, B., Alderson, B., Coleridge, J., Wightman, J., Erle, J., Platt, B., Martin, B., and Crompton, J.

*Unthank* (with whom was *Hugh Hill*), for the plaintiff in error.—The dates which it will be material to bear in mind, are as follows:—Stephen Cannon, the testator's, will was dated the 13th of November, 1796; the testator died on the 21st of April, 1797; the feoffment by Stephen Cannon, the father of the demandant, and the first tenant-in-tail, was dated the 31st of January, 1798; Stephen Cannon, the feoffor, died on the 29th of April, 1831; and the formedon was brought on the 28th of March, 1851.

The questions raised upon this record, and upon the bill of exceptions, are three,—first, whether the estate limited to the father of the demandant by the will of Stephen Cannon, the grandfather, was not too remote,—secondly, whether the will of Stephen Cannon, the grandfather, per se, proved the allegation in the count, that Stephen Cannon, the demandant's father, was seised of an estate-tail,—thirdly, as to the effect of the statute 3 & 4 W. 4, c. 27.

1. The devise to Stephen Cannon, the father, for life, and the devise over to his issue, it is conceded, gave the former an estate-tail, as was held by the Court of Common Pleas in *Doe d. Cannon v. Rucastle*, 8 Common Bench, 876. But it is submitted that the limitation to Stephen Cannon, the demandant's father, is an executory devise, and void for remoteness. The object of the testator was, to make provision for his son and his two daughters. He begins by devising to the trustees his

\*24] farming-stock and all his lands in Barco and Scaw, in \*trust for payment of debts, legacies, and funeral expenses. Then, in the event of the property so devised proving insufficient for that purpose, he devises to the trustees all and singular other his messuages, lands, and tenements whatsoever, to be by them sold and disposed of until his debts and funeral expenses shall be fully paid, and the residue, in case it should be found necessary to put this last devise in execution, but not otherwise, he directs shall be equally divided amongst all his children. Then comes the important provision,—“Provided that, in case my personal estate and my lands, &c., herein first above devised shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son Stephen, my dwelling-house, butchering-shop, stable, and byre in Friar Gate, and all my butchering utensils, also a small field at Freeridge Head, and all that dwelling-house, barn, and granary on the east side of Friar Gate aforesaid, To hold to my said son Stephen Cannon for and during the term of his natural life; and, from and after his death, then I give and devise the same to the issue of his body, lawfully begotten, if more than one, equally between them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs at law.” This is an alternative limitation, depending upon the sufficiency of the property first devised for the payment of the debts and legacies, and therefore too remote, because it could not be said, at the time of the testator's death, that all the debts would necessarily be paid within the period limited by the rule against perpetuities, viz. a life or lives in being, and twenty-one years afterwards. By reason of the absence of creditors beyond sea, and many other causes, debts might remain outstanding long beyond the period so limited. There are numerous cases, no doubt, to show that a mere devise for payment

\*25] of \*debts, is a trust limited to the necessity of the case, and is in substance a charge upon the estate; and that, wherever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require: *Doe d. White v. Simpson*, 5 East, 162; *Barker v. Greenwood*, 4 M. & W. 421; † *Adams v. Adams*, 6 Q. B. 860; *Watson v. Pearson*, 2 Exch. 581: † and see the authorities collected in 2 Jarman on Wills, 219. But that rule does not apply here, where there is a provision for the payment of debts, and then the estate is given to one set of individuals or to another, according as the fund so provided shall turn out sufficient or insufficient for the purpose. The limitation is void for remoteness, unless ex necessitate the estate *must* vest within the period of a life or lives in being and twenty-one years afterwards. [MARTIN, B.—Have you any authority for your proposition?] The authorities, such as they are, will all be found in *Lewis on Perpetuities*, pp. 622–638. In *Bagshaw v. Spencer*, 1 Ves. sen. 142, a testator devised all his manors, lands,

&c., to trustees and their heirs, upon trust that they should, out of the lands, &c., by the rents, issues, and profits, or by sale or mortgage of the whole or so much as should be necessary, raise money for the payment of his debts, legacies, and funeral expenses, and then, as to one moiety, upon trust for and to the use of his nephew T. B. for life, with remainders over. Questions arising as to the construction of different limitations in the will, an incidental point was, whether the limitations subsequent to the trust for payment of debts (which, it was held, carried the whole fee to the trustees) might be good by executory devise. Lord Hardwicke said that the devisee could not take a legal estate by executory devise,—“for, it is too remote, being after all debts indefinitely be paid, which \*may in point of time exceed a life or lives [\*26 in being, or any other time allowed by law.” The case, however, did not call for any express decision upon the point. The question also incidentally arose in *Strong v. Teatt*, 2 Burr. 912, *Hawker v. Hawker*, 3 B. & Ald. 537, and *Bacon v. Proctor*, 1 Turn. & Russ. 81. [*Willes*.—Unless the sale is to be made by these trustees personally, it may, *for the purpose of the argument*, be admitted that the devise is too remote.] There clearly is no limitation of the power of sale to the trustees personally: it is a devise to the trustees, their heirs and assigns, upon trust to sell, and to pay debts, &c. [*MARTIN, B.*—Does your argument go the length of saying that the devise of both estates is void?] It does. It is uncertain in whom the estate is to vest, until it is ascertained that there are no debts unpaid.

2. The learned judge ruled that the will, per se, proved the estate-tail as alleged in the count. That clearly is wrong: for, to prove that Stephen Cannon, the testator's son, took an estate-tail, it was necessary to prove that the estate first devised to the trustees for payment of debts and legacies was sufficient for that purpose, such sufficiency being a condition-precedent to the estate vesting in him. [*PARKE, B.*—Confining it to the construction of the will,—which is evidently what the learned judge meant,—the ruling is correct. But, if he is to be understood as dealing with the complicated question, it is wrong: the estate-tail is not proved *by the will*, unless it is first shown that the estate first devised for payment of debts was sufficient for that purpose. There is evidence of that, by the party's being in possession at the time of the feoffment.] The learned judge undoubtedly did say that there was evidence to go to the jury: therefore it would not be right to press this point; and the bill of exceptions may be considered as amended in this \*respect.(a) The question, then, is, whether the statement [\*27 in the count, that Stephen Cannon, the grandfather, “devised and gave to Stephen Cannon, the father of the demandant, and the

(a) The bill of exceptions was amended, by alleging that the counsel for the tenant objected that the count was not proved, and that the learned judge directed the jury “that there was evidence whence they might find that the count was proved.”

heirs of his body, the tenements aforesaid," is proved. It is not denied that the devise to Stephen Cannon, the father, is correctly described as a devise in tail: but this is a statement of the legal operation of the will alone, and imports an absolute devise, whereas the devise is *conditional*,—in case the estate first devised should prove sufficient for the payment of debts and legacies. It ought, therefore, to have been alleged according to the fact,—setting out the condition, and showing the condition performed. In *Buckmere's Case*, 8 Co. Rep. 88 a, Lord Coke desires the reader to note, that, "if a remainder be executed, in a writ of formedon in the descender, he shall never speak of this remainder, but the general writ of formedon in the descender shall serve in that case, and he shall count of an immediate gift; for, he cannot have a formedon in the remainder, when the remainder is once executed. But, if a lease for life be made, the remainder in tail to A., the remainder in tail to B., if A. dies without issue in the life of the tenant for life, if B. be driven to his formedon in the remainder, in his formedon he ought to mention the remainder to A., although it was determined and spent, as is aforesaid: for, the demandant in the formedon in the remainder ought to make mention of all the precedent remainders in tail: P. 8 E. 3, fo. 19, a, b, pl. 3; M. 38 E. 3, fo. 26, a, b; P. 44 E. 3, fo. 8, a, pl. 7; H. 50 E. 3, fo. 1, b, pl. 3; M. 11 H. 4, fo. 39, a, pl. 68; 18 H. 8, fo. 4; F. N. B. 219. Vide Register, 239, b, and 243, \*28] b, and 244, a, *brevia \*nunquam faciunt mentionem de remanere quando breve est in the descender.*

3. As to the statute of limitations,—that point arises upon the traverse to the second plea, and it also arose in the court below upon the demurrer to the replication to the third plea. [The court here called upon *Willes* to address himself to the construction of the will.]

*Willes* (with whom was *Spinks*), for the defendant in error.—The estate-tail devised by the will of Stephen Cannon, the grandfather of the demandant, vested immediately on the testator's death, subject to be divested in the event of the estate first devised to the trustees, for sale, and payment of debts and legacies, proving insufficient for that purpose. The will begins with a devise of estate A. to the trustees, in trust, for sale, and out of the proceeds to pay the testator's debts, legacies, and funeral expenses. It then goes on, "and, in case it shall so happen that,"—not that estate A. is insufficient, but that,—"*upon sale of my real and personal estate hereinbefore devised as aforesaid, the same shall be insufficient for the payment of all my just debts,*" &c., then he devises estate B. to the trustees, to be sold and applied as before directed as to estate A. Then comes the clause upon which the argument on the other side proceeds,—"*Provided, that, in case my personal estate, and my lands, tenements, and real estate herein first above devised shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son Stephen [estate B.], to hold to*

my said son Stephen Cannon for and during the term of his natural life, and, from and after his death, then I give and devise the same to the issue of his body," &c. It is clear that the second devise to the trustees was not meant to take effect, unless, after sale of the estate first devised to them, it should be found insufficient to pay the debts, legacies, and funeral expenses. But it is equally clear \*that the [\*29 devise of estate B. to Stephen Cannon, the testator's son, was to take effect at once,—subject to be defeated by the event upon which the trustees were to take it, viz. the insufficiency of the estate first devised to them. Such insufficiency is not to be presumed. The intention of the testator is obvious, either that the trustees should take estate B., or that his son Stephen should take it, until, *upon sale*, estate A. should be found insufficient. The argument is fortified by the direction in a subsequent part of the will, that the testator's son should not be entitled to the possession of the dwelling-house and premises until the expiration of three calendar months from the testator's decease. Unless the estate first devised is found insufficient, upon sale, to satisfy the debts, legacies, and funeral expenses charged upon it, the devise to Stephen Cannon, the son, attaches immediately. If this be the correct view of the will, there is no misdescription in the count. The gift is absolute, subject to be defeated by a condition-subsequent.

*Unthank* was heard in reply.(a)

*Cur. adv. vult.*

PARKE, B., on the 16th of April, 1853, delivered the judgment of the court :—

The case comes before the court on a writ of error from a judgment of the Court of Common Pleas on a demurrer, and also on a bill of exceptions from a ruling at *Nisi Prius* of my Brother Cresswell, in favour of the demandant, in a writ of formedon.

The defendant in error, Stephen Cannon, the demandant, brought an action of formedon in the descender against the plaintiff in error, for lands in Penrith, in the county of Cumberland.

The count stated, that, Stephen Cannon, the \*grandfather of [\*30 the demandant, was seised of lands in Penrith, in his demesne as of fee, on the 30th November, 1796, and afterwards, and before the 1st of January, 1838, to wit, on the day aforesaid, made his will, duly attested, and thereby devised and gave to Stephen Cannon, the father of the demandant, and the heirs of the body of Stephen Cannon the father, the tenements aforesaid, and afterwards died seised without revoking his will, leaving Stephen Cannon the father surviving; and that the said last-mentioned Stephen Cannon died within twenty years before the commencement of the formedon, viz. on the 29th of

(a) The argument on the statute of limitations was resumed in Hilary Vacation, 1853: but it was necessarily a mere repetition of what had been urged in the court below.

April, 1831, leaving Stephen Cannon, the demandant, his son and heir, surviving.

To this count there were several pleas. The first was, that Stephen Cannon the grandfather did not devise the lands to Stephen Cannon the father, and the heirs of his body, *modo ac formâ*. On this plea issue was joined.

The second was, that the right, title, and cause of action in the writ and count mentioned, did not first descend or accrue within twenty years before the suing of the writ whereby the action was commenced. To this the demandant replied that it did: and issue was joined on that replication.

The third plea states, that, after Stephen Cannon the father was seised, and twenty years and more before the commencement of the action, viz. on the 31st of January, 1798, Stephen Cannon the father *discontinued* the possession of the tenements aforesaid, and the receipt of the profits thereof; and that, from that time, neither Stephen Cannon the father, nor the demandant, was in possession of the said tenements or the receipt of the profits thereof.

To this plea, the demandant replied, that Stephen Cannon, the demandant's father, whilst seised of the said tenements, and before the discontinuance of the possession thereof, or the receipt of the rents and profits, viz. on the 31st of January, 1798, enfeoffed one William \*31] \*D. Rimington of the said tenements, to hold in fee; and that thereby the estate so devised to Stephen Cannon the father was discontinued, until the death of the father, and until the 31st of June, 1835, and until the commencement of the suit; and that Stephen Cannon the father died within twenty years before the commencement of the suit, and before the 31st of December, 1833, viz. on the 29th of April, 1831; and, further, that, on the 1st of June, 1835, the demandant was entitled to bring and maintain an action of formedon in the descender in respect of the said tenements, and so remained until the suing of the writ; and that Stephen Cannon the father never at any time after the enfeoffment was seised or possessed of or entitled to the said tenements, or to receive, and never did receive, the rents and profits thereof.

To this replication there was a general demurrer, and joinder in demurrer. After the argument of that demurrer, the court gave judgment for the demandant.

On the trial of the issues, the will of Stephen Cannon the grandfather was put in, and proved to be duly executed. It was dated the 30th of November, 1796, and it was as follows:—[His Lordship read the will.]

Evidence was then given of the death of the testator on the 21st of April, 1797, leaving Stephen, in the will called his son, the father of the demandant, surviving; of the indenture of feoffment of the 31st

of January, 1798, to the effect mentioned in the third plea, with endorsement of livery thereon, which deed and endorsement came out of the custody of the tenant, and were more than thirty years old; evidence also of livery of seisin was given, and that Stephen, the father of the demandant, was in possession at the time of the feoffment. Evidence was also given of the death of Stephen, the father of the demandant, on the 29th of April, 1831; and the issuing of the writ of formedon on the 28th of March, 1851.

\*The counsel for the tenant objected that this evidence was [\*32 insufficient to entitle the demandant to a verdict, and insisted that the issues should be found for the tenant. The learned judge refused to direct the issues to be so found, and directed the jury that there was evidence of the devise and gift alleged in the count, to Stephen Cannon, the father, and the heirs of his body (for it was agreed on the argument that the bill of exceptions should be amended to that effect); and, further, that the action of formedon had been brought in time.

We are all of opinion that the Court of Common Pleas were right in giving judgment on the demurrer for the demandant; and that the direction of the learned judge, so far as it related to the statute of limitations, given in conformity with that judgment, was correct. The reasons assigned for that judgment appear to us to be quite satisfactory.

The question is, whether, upon the true construction of the statute 3 & 4 W. 4, c. 27, the estate-tail having been discontinued, and the right of entry taken away by such discontinuance, on the 1st of June, 1835, the issue in tail can have his formedon within twenty years after the death of the tenant-in-tail, or whether the time begins to run in the life of tenant-in-tail.

The 38th section provides for this case. It enacts, "that, when, on the 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by (inter alia) any discontinuance, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the 1st of June, 1835, but only during the period during which, by virtue of the provisions of that act, an entry might have been made on the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

What, then, was the time when an entry might have \*been [\*33 made, by virtue of the act, if the right of entry had not been taken away by the discontinuance? That depends on the previous sections, the 2d, 8d, and 21st.

The 2d prevents any entry except within twenty years after the right to make such entry accrues to the party making it, or the party under whom he claims.

It is clear that the demandant could make no entry until the death



of his father; and, on the argument before us, Mr. Unthank, on the part of the tenant, conceded, that, if the question turned upon the 2d section, he could not have argued the point. But he placed his chief reliance on the first part of the 3d section, which enacts "that, in the construction of this act, the right to make an entry, &c., shall be deemed to have first accrued at such time as hereinafter mentioned, that is to say, when the person claiming such land, or some person under whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, and shall, while *entitled thereto*, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or *discontinuance of possession*, or at the last time when such profits were received."

We are all of opinion that the discontinuance of possession here referred to, means, the quitting possession of land, to the possession of which he was entitled. The right of entry begins the moment the possession has been discontinued by the party entitled to it; and, if not exercised in twenty years from that time, it is barred. The principle of the act, generally speaking, is, to bar a person who has a right to enter, if he does not exercise that right in a certain time, not to bar those who cannot exercise that right,—"*Contrà non valentem agere non currit præscriptio*."

To this rule there are express enactments to the \*contrary, as \*34] in ss. 21, 22, &c., which must of course prevail where they apply. But it is a strong thing to deprive a man of a right, who has had no opportunity of exercising it: and the general principle of the act, is, to extinguish rights which those who possess them have suffered to lie dormant.

The father of the tenant-in-tail could not have entered at any time after he had conveyed his estate to the feoffee. The discontinuance of possession mentioned in the 3d section, is analogous to the dispossession mentioned therein,—the ceasing to possess, when he had a right to possess.

We agree with the Court of Common Pleas, that the 21st section applies to the case where the right of entry of tenant-in-tail is barred *by his neglect* to make such entry in proper time, not to the case where he has conveyed away his own right to another, and put it out of his power to enter. In the latter case, the right of entry is not barred by reason of the same not being made within the period limited, but by reason of his not being able to enter against his own conveyance.

We concur in opinion, therefore, with the Court of Common Pleas, that the 38th section regulates the time within which the heir in tail must bring his formedon; that it authorizes the action to be brought within the time that he might have entered, if there had been no discontinuance; and that the time of entry was on the death of the

tenant-in-tail. We, therefore, affirm the judgment of the Court of Common Pleas on the demurrer; and we are of opinion that the ruling on the issue on the statute of limitations, on the trial, for the same reasons, was correct.

The points arising on the other issue, whether an estate-tail, as described in the count, was devised in the will,—were argued before us at some length. Mr. Unthank conceded that the devise to Stephen Cannon, the \*father, for the time of his life, and the devise over [\*35 to his issue, gave Stephen Cannon an estate-tail; but he contended,—first, that the limitation to Stephen was an executory devise, and was too remote,—secondly, that, if not too remote, still the estate-tail was given to Stephen Cannon the son, not absolutely, which it was contended was the meaning of the count, but on a contingency, and so the allegation of the devise in the count was not proved.

To this it was answered, that though, if it was an executory devise, it might be too remote, that it was an immediate devise to Stephen in tail, *defeasible* if the real and personal estate devised to the trustees for sale and payment of debts and funeral expenses, should be insufficient for that purpose.

It was not argued, and indeed could not be successfully argued, that the devise to the trustees and their heirs, of the different estates, in trust to sell and pay debts and legacies and funeral expenses, operated only as a *charge* on the estates, particularly as the beneficial interest in each estate goes to different persons, according as the real and personal estates first devised are sufficient or not for the purpose of paying debts, &c. Nor do we think that the devise to Stephen Cannon can possibly be considered as an absolute devise to him, in the first instance, defeasible if the estate real and personal first devised should be inadequate. Such construction would be to do violence to the express words of the will, which gives the estate in question in this suit to Stephen Cannon, the son, “*in case* the personal estate of the testator, and his lands, tenements, and real estate first above devised shall be sufficient to pay all his debts as aforesaid.” The testator says, “*then and in such case*, I give and devise to my son Stephen” the lands now in question. The construction contended for would be to \*change [\*36 the words entirely, and to make a condition precedent into a condition subsequent to it.

The only questions, therefore, are,—first, whether the contingency, viz. the sufficiency of the real and personal estate first devised, was too remote a contingency,—and, secondly, if it was not, whether the allegation in the count was proved.

As to the question of remoteness, reliance was placed, on the part of the plaintiff in error, on the ruling of Lord Hardwicke in *Bagshaw v. Spencer*, 1 Ves. sen. 142, where he held, that a limitation was too remote, after all debts were paid, which would not necessarily happen

within the prescribed limit. It was not, however, requisite to decide that point in *Bagshaw v. Spencer*, and therefore what Lord Hardwicke held did not amount to a decision.

In the present case, the limitation over does not depend on the *actual payment* of all the debts, but on the sufficiency of the assets to pay them, and on that sufficiency being ascertained by the sale of the real and personal estate of the testator comprised in the first devise, by public auction, pursuant to the trust on which the first devise is made to Williamson and Bowman, and their heirs. The second provision is, "in case it shall happen, that, *upon sale* of my real and personal estate hereinbefore devised, it shall be insufficient for the payment of all my just debts and funeral expenses," the residue of the real estate is given to the same trustees: provided, that, in case his personal estate and lands first devised shall be sufficient to pay all his debts *as aforesaid*, then and in such case there is a devise to Stephen, the son, in tail, of the lands and tenements in question in this suit. It seems to us that the words "*as aforesaid*" refer to the sale before directed, and are \*37] equivalent to saying, that, if the estate shall be sufficient upon \*such sale taking place, then the second estate shall go over.

Then, if this be so, the sale herein mentioned being to be made by the trustees, who are also executors, we think it must be deemed to be a sale within a year of the testator's death,—the ordinary time which is allowed to an executor to collect the assets and pay the debts of the testator; and, consequently, the limitations over depend upon an event which will be presumably ascertained in a year after the death of the testator, by the sale of the real and personal estate. And therefore we think the limitation over is not void on the ground of remoteness.

The last remaining question, is, whether the count, which states that Stephen Cannon, the deviser, devised to Stephen Cannon, the father of the demandant, and the heirs of his body, the tenements aforesaid, is proved. So far as relates to the devise being a devise in tail, it was admitted that the averment was correct: but it was controverted, that this was a statement of the legal operation of the will alone, on the face of it; and that it imported an absolute devise, whereas, in truth, it was a conditional one, in case on the sale of the first devised estates, the produce should be sufficient for the payment of the debts, &c. And we are of that opinion.

It is clearly a statement of the legal effect of the will alone. According to the rule laid down in *Buckmere's Case*, 8 Co. Rep. 88 a, in a writ of formedon in the descender, the demandant shall never speak of a remainder executed, but the general writ of formedon in the descender shall serve, and he shall count of an immediate gift; for, he cannot have a formedon in the remainder, when the remainder is once executed,—"*Brevia nunquam faciunt mentionem de remanere quando breve est in the descender:*" Reg. Brev. 239 b, 243 b, 244 a. It was

perfectly right, therefore, to omit all mention of \*the previous limitations in this will, and to begin with the devise to Stephen [\*38 Cannon, the father : but then the devise ought to be stated according to the fact,—an absolute one, if absolute,—a conditional one, if on a condition precedent. If defeasible by a condition subsequent, such a condition need not be noticed, according to the general rule : see *Brook v. Spong*, 15 M. & W. 152,† and the cases there referred to. In the case of *Brice v. Smith*, Willes, 1, the court held, that the statement in the count in *formedon*, of a devise to the demandant's father, in tail, was correct, though it omitted a condition : but then the condition was a *subsequent one*, viz. on non-payment of a sum of money, within a year after the estate-tail commenced, to a third person, the estate-tail was to go over ; and that falls within the general rule of pleading above mentioned. Here, it was a condition *precedent* to the estate-tail vesting in the demandant's father, that the real and personal estate first devised should be sufficient ; and the condition, and its performance, should have been stated.

We, therefore, feel ourselves obliged to hold that the allegation of the devise in the count in this case is not correct : consequently, the direction of the learned judge, that there was evidence that Stephen Cannon, the grandfather, devised as stated in the count, was wrong, and therefore there must be a *venire de novo*.

Whether this defect cannot be amended, under the statute 15 & 16 Vict. c. 76, s. 122,(a) upon terms, is not any part of the question before us.

*Venire de novo.*

(a) That section, after a recital, that "whereas the power of amendment now vested in the courts and the judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form," enacts as follows :—"It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *Nisi Prius*, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not ; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit ; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made."

### \*JUSTICE, Appellant, GOSLING and Others, Respondents.

*Feb. 5.*

[\*39

The 2 & 3 Vict. c. 47, s. 54, imposes a penalty not exceeding 40s. for, amongst other things, "furious driving" in a thoroughfare ; and s. 63 empowers any constable of the metropolitan police district to take into custody, without warrant, any person who, *within view of such constable*, shall offend in any manner against the act.

In an action in a county court against constables for a tort in taking the plaintiff into custody on a false and unfounded charge of furiously driving a horse and gig, to the danger of the passengers in a public highway,—the plaintiff, in stating his case, admitted that he had been taken before two justices, convicted, and fined 20s., and that he had paid the penalty, and had not taken

any steps to impeach the validity of the conviction. The judge thereupon asked the defendants if they could prove the conviction; and they accordingly put in an examined copy, which stated the offence, but did not allege that it was committed "within view of the constables." The judge, being of opinion, that, "under the circumstances, the conviction was an answer to the plaintiff's claim for damages," directed the jury to find for the defendants:—Held, a misdirection.

THIS was an appeal against a decision of the deputy judge of the county court of Herts holden at Barnet, in a plaint in which Walter Justice was plaintiff, and William Gosling, John Sumner, and Thomas Sunman, were defendants.

The particulars of the plaintiff's demand stated that "the action was brought to recover the sum of 25*l.* as and for compensation in damages for a trespass committed by the defendants, some or one of them, in illegally and wrongfully taking the plaintiff into custody, on or about the 22d of April, 1851, at Whetstone, in the county of Middlesex, on a false and unfounded charge of furiously driving a horse and gig, to the danger of the passengers in the public thoroughfare at Whetstone aforesaid, on the said 22d of April, 1851, and for conveying the plaintiff from Whetstone to Barnet, and detaining him at the police-station at Barnet, upon the said charge, against the will of the plaintiff."

\*40] The cause came on to be tried by a jury on the 29th of August, 1851, when, several preliminary objections having been taken, and reserved, the plaintiff proceeded to open his case in person. He stated, that, on the 22d of April, 1851, between 10 and 11 o'clock at night, the defendants Gosling and Sumner took him into custody on a charge of furiously driving a horse and gig, to the danger of the passengers in the public thoroughfare at Whetstone aforesaid, being the taking into custody in the said plaint and summons mentioned; that such charge was false and unfounded; that, upon the last-named defendants charging him with the said offence, and before they took him into custody, he offered to inform them of his name and residence, and to verify the information which he so offered, by a person who knew him, and who resided at Whetstone; but that the said two defendants refused to take his name and residence, or the said card which he so offered; and that they thereupon took him into custody on the same charge from Whetstone aforesaid to Barnet aforesaid; that, at their request, the other defendant detained him at the police station at Barnet, till he gave bail to answer the charge; that the charge on which the defendants so took him into custody was afterwards heard and determined by and before James Dickins and Charles Herbert Cotterell, then being justices of the peace, who then had jurisdiction so to hear and determine the same, who convicted him of the offence wherewith he was so charged, and fined him 20*s.*

Upon the plaintiff's making this statement of his having been convicted upon the said charge, the attorney for the defendants immedi-

ately insisted, on their behalf, that the plaintiff, by such statement, had put himself out of court.

The deputy judge then inquired whether the defendants were in a condition to prove the conviction; \*whereupon an examined copy [\*41 of the record thereof was produced, and duly proved. It was as follows:—

“Metropolitan Police District, and county of Middlesex, to wit: Be it remembered, that, on the 28th of April, 1851, Walter Justice, of, &c., within the said metropolitan police district, and county of Middlesex, is brought before us, James Dickins and Charles Herbert Cotterell, two of her Majesty's justices of the peace for the said county of Middlesex and county of Hertford, sitting at the Barnet petty-sessions court, within the metropolitan police district, and said county of Hertford, and is charged before us with having on the 22d of April, 1851, at the parish of Finchley, in the said district and county of Middlesex, in the public thoroughfare there situate, then and there furiously driven a horse and gig along such thoroughfare, to the common danger of the passengers in such thoroughfare; and, it appearing to us, James Dickins and Charles Herbert Cotterell, upon the oath of William Gosling and John Sumner, credible witnesses, that the said Walter Justice is guilty of the said offence, we do hereby adjudge the said Walter Justice to forfeit and pay, for his said offence, the penalty of 20s., to be applied as the statute in that case made and provided directs. Given under our hands on the day and year first mentioned.

(Signed) “JAMES DICKINS,

“CHARLES HERBERT COTTERELL.”

The plaintiff admitted that he had paid the penalty so adjudged to be paid by him, and had not appealed from the said conviction, or taken any other step to impeach the validity thereof.

The deputy judge, being of opinion, that, under the circumstances hereinbefore mentioned, the conviction was an answer to the plaintiff's claim for damages, directed the jury to find a verdict for the defendants.

The plaintiff, being dissatisfied with that \*determination and [\*42 direction in point of law, appealed. The parties not agreeing on the facts, the case was stated by the deputy judge.

*Richmond*, for the appellant.—The direction of the judge of the county court was clearly wrong. The only evidence to sustain the defence, was, the conviction. That, however, was not admissible at all: it is no more than a letter from the justices to the judge of the county court, giving their opinion. In *Phillips on Evidence*, vol. 2, 9th edit., p. 28, it is said,—“From the rule that verdicts and judgments are only evidence between the same parties, it follows, as a consequence, that a conviction in a *criminal* proceeding cannot be admissible in a *civil* action. Where the conviction has actually proceeded on the evidence of the party seeking to make use of it, the receiving of the con-

viction would be allowing a party to give evidence for himself. (Smith v. Rummens, 1 Campb. 9; Hathaway v. Barrow, 1 Campb. 151.) According to some authorities, the evidence of convictions is rejected, in civil suits, on the ground of the *possibility* that the conviction might have proceeded partly on the evidence of the party seeking to use it. But it seems now settled, that the evidence is inadmissible, upon the more general ground of want of mutuality in the parties:" see the judgment of Parke, B., in Blakemore v. The Glamorganshire Canal Company, 2 C. M. & R. 139.† To render a judgment conclusive, the parties and the matter in difference must both be the same. Here, the parties before the justices, and the parties to the action, were essentially different: and the charge before the justices was one of furious driving, the charge before the county court was trespass and false imprisonment. The conviction, therefore, even if admissible, was wholly irrelevant. The judge treated it as *conclusive*, and would not \*43] allow the plaintiff to go into his case. The \*statute upon which the conviction is founded, is, the 2 & 3 Vict. c. 47, the 54th section of which enacts "that every person shall be liable to a penalty not more than 40s., who, within the limits of the metropolitan police district, shall, in any thoroughfare or public place, commit any of the following offences,"—amongst others, "who shall ride or drive furiously, or so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare." Then section 63 enacts "that it shall be lawful for any constable belonging to the metropolitan police district, and for all persons whom he shall call to his assistance, to take into custody, without a warrant, any person who *within view of such constable* shall offend in any manner against this act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable." It was not shown here, that the alleged offence was committed *within view of the defendants*, or of either of them; so that the statute affords no justification for the arrest. To justify an arrest, without warrant, under this act, it must be shown that the party was found committing the offence at the time of the apprehension: Mathews v. Biddulph, 3 M. & G. 390 (E. C. L. R. vol. 42), 4 Scott, N. R. 54; Simmons v. Millingen, 2 C. B. 524 (E. C. L. R. vol. 52).

*Ellis*, *contra*.—The objection that it was not shown that the offence was committed within view of the constable was not made at the trial, and therefore is not open to the appellant now. [WILLIAMS, J.—It sufficiently appears upon the statement that the judge decided without hearing the whole case. MAULE, J.—The case amounts to this,—The plaintiff was taken before the justices, and convicted on a false charge; and, upon proof of the conviction, the judge of the county court non-\*44] suited him. Do you contend that the case \*shows that the plaintiff was lawfully taken into custody?] Yes. The 64th section.

of the statute enacts "that it shall be lawful for any constable belonging to the metropolitan police to take into custody, without a warrant, all loose, idle, and disorderly persons whom he shall find disturbing the peace, or *whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanour, or breach of the peace*, and all persons whom he shall find, between sunset and the hour of eight in the morning, lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves." The plaintiff was bound to show that the constables had exceeded their duty. [MAULE, J.—It is for the defendants to justify the trespass with which they are charged.]

*Per Curiam*.—The appellant is clearly entitled to a new trial, with costs of the appeal. Rule accordingly.

#### RICHARD WHITAKER v. WISBEY. Feb. 4.

An assignment of a felon's goods, *bonâ fide* made, for a good consideration, after the commission day of the assizes, but before the day upon which he was actually tried and convicted, will pass the property.

THIS was an action of trover for household furniture, goods, and chattels. Pleas,—not guilty, and not possessed.

The cause was tried before Cresswell, J., at the last Summer Assizes at Huntingdon.

The plaintiff claimed the goods in question under an assignment thereof made to him by his brother, Thomas Whitaker, on the 20th of March, 1851, under the circumstances hereinafter mentioned. The defendant was an auctioneer at Cambridge, who had sold the goods \*under the direction of the corporation of Cambridge, who claimed [\*45 to be entitled to them as grantees of felons' goods.

George and Thomas Whitaker, the father and brother of the plaintiff, were tried and convicted of arson, at the last Spring Assizes for Cambridge. The commission day was Wednesday, the 19th of March; the deed of assignment was executed by Thomas Whitaker, for a good consideration, on the 20th; and the prisoners were tried and convicted on the 22d.

The defendant put in the record of the conviction formally drawn up, the captain alleging it to have taken place on the first day of the assizes, viz. the 19th of March; and it was insisted that this was conclusive evidence that the conviction took place on that day, and that it was not competent to the plaintiff to show, that, in point of fact, the conviction was after the date of the assignment.

The jury having found that the deed was executed *bonâ fide*, and for a good consideration, the learned judge directed a verdict to be entered



for the plaintiff, reserving leave to the defendant to move to set it aside, and to enter the verdict for him, if the court should be of opinion that the record was the only admissible evidence to show the date of the assignor's conviction.

*Prendergast*, in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendant upon the second issue. He submitted that the conviction had relation to the first day of the assizes, and that it was not competent to the plaintiff to show that it took place on a later day. He cited *The King v. Thurston*, 1 Lev. 91, Anonymous, Case ccciii., 1 Anderson, 294, *Panter v. The Attorney-General*, 6 Bro. P. C. 486, and Rolle's Abridgment, *Execution* (Z), pl. 13, p. 892.

\*46] *Worledge and Bircham* now showed cause.—So far as regards the goods of felons, it is clear that the title of the crown only relates back to the time of the conviction. In Hale's Pleas of the Crown, Vol. 1, p. 361, it is said: "The goods of a person convict of felony or treason, or put in exigent for the same, or that fled for these offences, or that stands mute, are forfeit to the King. But the relation of these forfeitures refers not to the time of the offence committed or to the time of the flight, but only to the conviction, or to the time presented, or to the time of the exigent awarded. And therefore an alienation made by the felon or traitor, or person flying, *bonâ fide* and without fraud, mesne between the offence or the flight and the conviction, or presentment of the flight, is good, and binds the King: but, if fraudulent, then it is avoidable by the statute of 13 Eliz. c. 5." Again, p. 365,—“By the statute 25 E. 3, c. 14, where a party is indicted of felony, the process directed by that statute, is, first, a *capias*, and, if he be not found, a second *capias*, together with a precept to seize his goods, and, if he be not found, then an exigent, and the goods to be forfeit. And this is more than a simple seizure, such as was before at common law; for, if the party came not in, his goods are forfeit upon the award of the exigent; and, if he came in, though his goods be saved, yet there is no direction for delivering his goods upon security; but it seems the sheriff is to take them into his custody, and yet out of them must allow sufficient for the sustenance of the prisoner and his family. Quære, whether, in the case of such a seizure, a sale for a valuable consideration before conviction and after seizure do not bind the King; as it seems it doth in the case of seizure and delivery to the Villata: vide *Fleetwood's Case*, 8 Co. Rep. 171. This statute extends as well to treason as to felony, and yet it mentions only felony; and therefore at this day \*the exigent goes out upon the second \*47] *capias* returned non inventus, as well in treason as felony. By the statute of 1 Ric. 3, c. 3, it is enacted that neither sheriff, &c., nor other person, take or seize the goods of any person arrested or imprisoned, before he be convict of the felony according to the law of

England, or before the goods be otherwise lawfully forfeited, upon pain of forfeiting the double value of the goods so taken. Mr. Stamford thinks this is but an affirmance of the common law, only that it gives a penalty; but it seems to be somewhat more than so, for, this prohibits the seizure of the goods of a party imprisoned, though he were also indicted, but not yet convicted, where unquestionably the common law allowed such a seizure, as is before declared, if the party or his friends did not secure the forthcoming of the goods, where the party was indicted." In *Perkins v. Bradley*, 1 Hare, 219,—where it was held, that an assignment of funds by a prisoner on a charge of felony, to secure payment of an antecedent debt, and costs to be incurred in his defence, was established, notwithstanding his subsequent conviction,—Sir J. Wigram, V. C., says: "To the argument, that a colourable alienation of goods by a person under a charge of felony, for the purpose of avoiding a forfeiture, would be fraudulent and void as against the crown, I assent; but it is a principle which is well settled, that, in the case of goods and chattels, the forfeiture has relation only to the time of conviction: *Hawk. P. C.*, b. 2, c. 49, §§ 13, 30. The forfeiture is by conviction: *Co. Litt.* 391 a: a rule which is inconsistent with the proposition that all the prior dealings of the felon, after the commission of the act, or after he was under the charge of felony, are to be overreached by his subsequent conviction. This conclusion does not rest merely on principle, but is clear upon several authorities. It is laid down by Sir W. Blackstone, 4 Bl. Comm. 387, 388, that the accused person \*may sell his goods for the sustenance of himself and family between the fact and conviction; and the reason he [\*48 assigns is, that 'personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony; yet,' it is added, 'if they be collusively, and not bonâ fide, parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5) will reach them.' " It is clear, therefore, that the accused may, by a bonâ fide assignment, convey his goods after the commission of the felony; and there is no authority for saying that his right so to assign ceases on the commission day of the assizes. Suppose the party not in custody, or the offence not committed, until after the commission day, could it be said that a conviction on a subsequent day would have relation back so as to avoid a bonâ fide conveyance by the felon before he was taken or before the offence was committed? The forfeiture as to lands, relates back only to the day of the offence committed,—(1 Wms. Saund. 363, n. (c),) so that the doctrine contended for on the other side, if carried to its full extent, would cause a conflict between the two cases, of lands and goods. There is no case to be found that is exactly parallel in its circumstances with the present. In *Jones v.*

Ashurt, Skinner, 857, the conveyance was found to be fraudulent; and in *Shaw v. Bran*, 1 Stark. N. P. C. 319, the deed was executed before the commencement of the assizes. Though the conviction is not traversable, it is perfectly competent to the plaintiff to show the time at which the trial actually took place. That the assize is all one day is a mere fiction of law; and the court, as Lord Mansfield said in *Johnson v. Smith*, 2 Burr. 950, 968, 1 W. Blac. 207, 215, "will not endure that a *mere form*, or *fiction of law*, introduced \*49] \*for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing; and they have for one hundred and fifty years uniformly held, that, where it became *material* to distinguish, they would consider the day when the writ was taken out, as the *substance*, and the teste as the *form*." "In *fictione juris semper æquitas existit*:" 11 Co. Rep. 51. In the 8d Institute, c. 104, p. 230, Lord Coke cites the following case:—"At twelfe sessions of the peace holden at Norwich, for the county of Norfolk, anno 32 Eliz., one Syer was indicted of burglary supposed to be committed 1 Augusti, anno 31 Eliz., whereunto Syer pleaded not guilty. And, upon the evidence it appeared that the burglary was committed 1 Septemb. anno 31 Eliz., so as at the time alleged in the indictment, there was no burglary done: and it was conceived that the very true day in the indictment was necessary to be set down in the indictment, and so avoid feoffments, leases, &c., for that, as it was conceived, the feoffee, lessee, &c., when the attainder is upon a verdict, should not falsify in the time of the felony: and thereupon the jury found Syer not guilty. And at the same sessions Syer was again indicted for the same burglary done 1 Septembris, anno 31 Eliz., when in truth it was done. And he that gave the charge at that sessions doubted whether upon this matter Syer might plead *auter foitz* acquite for the same burglary; and thereupon he stayed the proceeding against him, and, the assizes being at hand, he acquainted the justices of assize, Wray, C. J., and Peryam, J., with this case, and with the doubts conceived thereupon; who answered him, that the like case had then been lately propounded by Peryam, J., to all the justices of England; and by them three points were resolved. 1. That the crown was not bound to set down the very day when the treason, felony, &c., was done, but the day set down in the indictment being before or \*50] after the offence done, the \*jury ought to find him guilty, if the truth of the case be so; and, if it be alleged before the offence done, to find the day when it was done in *rei veritate*, for, they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment: 2. That, if the triers find the offender guilty generally, yet the feoffee or lessee, &c., if the offence be alleged in the indictment before it was done, to their prejudice, may falsifie in the time, but not for the offence; for, seeing the crown is not bound to

set down the very just day when the treason or felony, &c., is done, and that the triers have chief regard and respect of the offence itself, God forbid but that the subject might falsifie as concerning the time of the offence: 3. If the offender be found not guilty, he in that case might plead, upon a new indictment, *auter foitz acquite*: and so Syer, in the case aforesaid, did, and was thereupon discharged according to the said resolutions." There are many authorities to show that legal fictions are not allowed so as to work injustice; see *Butler and Baker's Case*, 3 Co. Rep. 25, 28 b; *Hynde's Case*, 4 Co. Rep. 70 b; *Huys v. Wright*, Yelv. 35; *Morris v. Pugh*, 3 Burr. 1242, 1 W. Blac. 812, 320, where Lord Mansfield said, "Fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose *not* within the reason and policy of the fiction, the other party may show the truth;" *Bennett v. Isaac*, 10 Price, 154; *Lyttleton v. Cross*, 3 B. & C. 817 (E. C. L. R. vol. 10), 5 D. & R. 175 (E. C. L. R. vol. 16). Abbott, C. J., in the last-cited case, says,—“It is a general rule, that, where it is for the interest of the party pleading, to show that a proceeding did not take place at the precise time when by fiction of law it is supposed to have happened, it is competent for him to do so. Where a bill is filed against an attorney in vacation, which by fiction of law is \*supposed to take place in term, it is [\*51 competent to the party filing the bill to show the very day when the bill was filed. And so in the case of writs, which are supposed to issue in term, it is competent to a party to show the time when they actually issued, if that be necessary, in order to avail himself of the statute of limitations.” That case goes the full length of this case. For the purpose of doing substantial justice, the court will notice the fraction of a day: *Sadler v. Leigh*, 4 Campb. 197; *Thomas v. Desanges*, 2 B. & Ald. 586. In *Roe d. Wrangham v. Hersey*, 3 Wils. 274, the court say: “It is said there is no *fraction* in a day, but this is a *fiction in law*, *fictio juris neminem lædere debet*, but aid much it may; and this is seen in all matters where the law operates by *relation*, and division of an instant, which are fictions in law.” [WILLIAMS, J.—Is this a question of fiction or relation at all? Is not the real question whether or not the record is so drawn as to estop you? Suppose it had by mistake stated a conviction at an antecedent assize, could you have averred against that?] It is submitted that we might. [MAULE, J.—You say you are not averring against the record at all: the court knows that an assize day consists of several natural days.] Precisely so. The adjournment ought to have been entered on the record: 2 Hale, P. C. 24. The plaintiff is not to be prejudiced by the omission to do so.

*Prendergast and O'Malley*, in support of the rule.—Until the record was put in, there was no legal evidence of the trial and conviction: and it was not competent to the plaintiff to contradict what appeared upon

the face of the record. In 1 Phillipps on Evidence, 10th edit. p. 441, it is said: "Parol evidence is not admissible of the day on which a cause came on to be tried, because it is matter of record, and ought to be proved as such;" for which is cited the ruling of Lord Ellenborough \*52] in Thomas v. Ansley, 6 Esp. N. P. C. 80. [MAULE, J.—That authority would have been more to the purpose, if the record had been produced, showing that the trial took place on the first day of the sittings, and Lord Ellenborough had refused to allow evidence to be given that the cause was in fact tried at a later day.] In Pope v. Foster, 4 T. R. 590, the court say, "that a party, in stating the proceedings at Nisi Prius, might allege that the trial was had on the first day of the sittings, although in fact it was had on a subsequent day of the same sittings, the whole sittings being in law but one day." But, in the subsequent case of Purcell v. Macnamara, 9 East, 157, that case seems to have been overruled, upon a ground which fully bears out the present argument—see the judgments of Lawrence, J., and Le Blanc, J. In Hawkins's Pleas of the Crown, Vol. 1, p. 195, s. 15, it is said—"It is to be observed, that, where persons being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and, if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any further inquiry, unless he have some reasonable matter to allege in his excuse—as, that the prison was set on fire, or broken open by enemies, &c.; for, *he shall be concluded by the record of the commitment to deny that the prisoners were in his custody.*" An act of parliament which is to take effect "from and after the passing of the act," was held to operate by legal relation from the first day of the session: Panter v. The Attorney-General, 6 Bro. P. C. 486; Latless v. Holmes, 4 T. R. 660. To remedy the inconvenience which was found to arise from this relation, it was found necessary to pass an act "to prevent acts of parliament from taking effect from a time prior to the passing thereof,"—33 G. 3, \*53] c. 13. Lord Holt, in St. Andrew's, Holborn, v. St. Clement \*Danes, 2 Salk. 606, says, "the sessions, as well as the term, is but one day in law." No evidence could be given, therefore, to contradict the record, by showing that the party was convicted after the day on which the assizes commenced. "All matters of record, in respect of their highness, are presumed in law to carry in themselves absolute truth." Plowd. Com. 491 a. The same doctrine of relation applies to judgments at common law, which relate to the first day of term, though delivered after: 2 Wms. Saund. 9 b, n. (5). Hynde's Case, 4 Co. Rep. 70, is also an authority to show that "an averment cannot be taken to contradict anything within the record." In Lord Porchester v. Petrie, 3 Dougl. 261, where the authorities were much considered, Lord Mansfield says: "It is an ancient and fundamental

maxim, that judgments and acts of parliament are of the first day of the term or of the session. As to judgments, for the sake of a lien on land, an exception has been introduced by statute.(a) *A fiction shall not be contradicted, in order to defeat the ends of that fiction*; but it may be contradicted, if its objects are not thereby destroyed." And, in delivering the ultimate judgment of the court, his Lordship says: "It is laid down in *Johnson v. Smith*, 2 Burr. 950, 1 W. Bl. 207, that judgments shall be complete, and shall bind, to all intents and purposes, by relation. This is the rule of the common law, and no authority can be found to contradict it. In *Standford v. Cooper*, Cro. Car. 102, a sci. fa. was brought on a judgment in debt obtained in Hilary Term; the defendant pleaded a statute acknowledged the 22d of January; and, on demurrer, it was adjudged that the judgment related to the essoin day. That was a very strong case, for, the statute was acknowledged on the day before the first day of the term, and the court, which is \*bound to take notice of its own proceedings, must know and see that the judgment could not be given till the 23d of [\*54 January, and consequently, was subsequent to the statute. They held, however, that the legal fiction and relation should prevail against the truth and fact of the case. In *Gerrard v. Norris*, Latch, 53, the plaintiff was in under an elegit, the judgment being given crastin. Trin., which was the 20th of June. The defendant claimed by virtue of an extent under a statute of the same term, but earlier, viz. the 20th of June. The reporter adds, he heard that it was adjudged that the plaintiff had the better right, because he claimed to be in under a judgment, and all the term is only one day in law. In that case, the attempt was, to make a fraction of a day; and the defendant pleaded that his statute was before the judgment, but the court would not allow it. In *Miller v. Bradley*, 8 Mod. 189, the defendant moved to have the execution set aside, because the judgment on which it was taken out was not really a judgment till the morrow of the Holy Trinity, and so was not sufficient to warrant the issuing of the execution; but the court said that it was a judgment of the first day of the term in which it was obtained, by relation. It must, from the argument, have been sworn that the judgment was not in truth and in fact given till the morrow of the Holy Trinity: but the court held, that though the fact appeared, the legal relation must prevail." Upon the same principle, it was held, in *Jacobs v. Miniconi*, 7 T. R. 81, that the death of the defendant between the commission day and the day of trial, is not a ground for setting aside the verdict for the plaintiff.(b) [MATULE, J.—The real reason for that is given in the case in *Salkeld*, which is referred to, viz. that it is a remedial law, and to be construed

(a) 29 Car. 2, c. 3, ss. 13, 14, 15.

(b) As to sittings in term, see *Taylor v. Harris*, 3 B. & P. 549.

\*55] so as to further it.] \*In *Greenway v. Fisher*, 7 B. & C. 436 (E. C. L. R. vol. 14), 1 M. & R. 330, where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt,—it was held that final judgment signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. In *Rex v. Shaw*, R. & R. C. C. 526, it was held, that, if the record of the conviction of a prisoner is produced by the proper officer, no evidence is admissible to dispute what it states. Where fictions of law operate hardship, the inconvenience resulting from a rigid adherence to the strict rule of law is in many cases aided by amendments: *Ladd v. Arnaboldi*, 1 C. & J. 97,† *The King v. Carlile*, 2 B. & Ad. 362, 971 (E. C. L. R. vol. 22). But this is not a case in which the court would allow an amendment to defeat the policy of the law.

MAULE, J.—This case has been argued before us in a very learned and elaborate manner; every authority which could have the remotest possible bearing upon the subject, has been referred to: but I must own that I have not throughout entertained the slightest doubt. The action was in trover, to which there was a plea of not possessed. The plaintiff claimed the goods in question under a deed of assignment, executed on the 20th of March, 1851, by Thomas Whitaker, the plaintiff's brother. It appeared, that Thomas Whitaker, the assignor, and George Whitaker, his father, were tried and convicted of felony at the last Spring Assizes for the county of Cambridge; that the commission-day of the Assizes was the 19th of March; and that the trial and conviction of the prisoners took place on the 22d. The substantial defendants in this action, were, the Corporation of Cambridge, who claimed as grantees of the goods and chattels of felons convict, &c. It was \*56] found by the jury \*that the conveyance under which the plaintiff claimed was executed bonâ fide and for a valuable consideration; and he had, no doubt, a good title, unless it was taken away by the assignor's conviction. The record of the conviction was produced by the defendant, drawn up probably at his instance; and it was insisted that, inasmuch as the assizes commenced on the 19th of March, and the record in point of form showed that all that was done at these assizes took place on that day, it was not competent to the plaintiff to give parol evidence that the conviction in point of fact took place on the 22d, for, that would be to contradict the record. The record of the conviction begins with a caption, that, at a certain assize held on the 19th of March, 1851, at, &c., the jury presented so and so; and thereupon it is considered, &c. I find no allegation that the thing took place on the particular day, except as above mentioned. It must be intended that the conviction took place at the assizes; and it must be intended, if it is not competent to the plaintiff to show the contrary,

that the assizes began and ended on the 19th of March. The record is, no doubt, evidence of the matters stated in it. But the question is, whether, where the assizes continue for several days, it may not be shown that in point of fact the trial and conviction did not take place until the 22d. I apprehend that it may, consistently with every principle of law, and every decided case. It is perfectly well known, and is indeed matter of judicial cognisance, that the assizes may, with or without adjournment, continue beyond a day, and, so continuing, may without any impropriety be described as it is described on this record. There is no necessity for stating any adjournment from day to day. But, is it to be said, that, because the proper form of describing the assizes, is, to describe them as being held on the commission-day, the plaintiff is therefore barred from showing the actual fact? It is said, that, by offering evidence \*to show that the conviction took place on the 22d, the plaintiff was offering to prove something [\*57 inconsistent with and contradictory to the record. That is a fallacy. He does not show anything inconsistent with the record. No doubt, it would *primâ facie* be intended that the assizes in question finished as well as began on the 19th of March: but that expression is capable of meaning that the assizes continued beyond the one natural day; and, when you allege that the conviction actually occurred on the 22d, you are not showing that it did not take place on the 19th, in the sense in which it is so stated in the record,—viz. that the assizes commenced on the 19th, and that the conviction took place during the continuance of those assizes. There is no more inconsistency in that, than there would be in showing that the conviction took place at a particular hour on the 19th; and I apprehend nobody would deny that that might be shown, if necessary. That is the real principle upon which I think we are bound to decide this case: and it is quite reconcilable with the doctrine as to fictions of law, which are never permitted to prevail against justice. In *Roe d. Wrangham v. Hersey*, 3 Wils. 274, it is said,—“By fiction of law, the whole term, the whole time of the assizes, and the whole session of parliament, may be, and sometimes are, considered as one day; yet the matter of fact shall overturn the fiction, in order to do it is rather a legal phrase which comprehends every day of the assizes. justice between the parties.” This can hardly be called a fiction of law; Several other cases have been cited to show that the whole term is in law considered as one day: but it is not so for all purposes, otherwise there could not have been several return days. The relation to the first day of the term is in most cases matter of direct operation of law, and not of fiction. Thus, a judgment, though signed on the last day of the term, operates and takes effect from the first day. In \*this there is nothing inconsistent or incongruous. So, an execution has relation back to a particular time,—now, to the time [\*58 of its delivery into the sheriff's hands. So, in the case of bankruptcy,



the property vests in the assignees by relation from the act of bankruptcy. That is the nature of the relation to the first day of term. In the case of acts of parliament, it had been judicially determined, that, in the absence of any particular provision for its commencement, every act of parliament passed in a session took effect from the first day thereof. It was perfectly competent to the legislature to alter that relation. There was no question of fiction of law. Upon the broad general principle that the truth is always to prevail against fiction, and that there is here no contradiction in substance to what is stated upon the record which was produced, the case of the plaintiff seems to me to be unanswered.

The last point is perfectly new, and it is so startling that I do not apprehend it will ever become old. No doubt, it is competent to the law to say that the property of felons shall be forfeited from the first day of the assizes. But the law has not said so. The jury in this case have expressly found that the conveyance to the plaintiff was *bonâ fide*, and for a valuable consideration. If the argument urged on behalf of the defendant were to prevail, the effect might be,—in a place like Liverpool, for instance, where the assizes frequently continue for three weeks,—that a prisoner might be convicted of a felony committed after the commencement of the assizes, and, supposing him to be a trader, all dealings with him in the interim, even before the offence committed, would be invalidated. I cannot think the law could sanction so manifest an absurdity.

For these reasons, I think the rule to enter a verdict for the defendant upon the issue on not possessed, should be discharged.

\*59] \*WILLIAMS, J.—I am entirely of the same opinion. I agree with my Brother Maule, that the counsel for the defendant have cited every case that could be brought to bear upon this case; and I say this, because, in the interval between the commencement and the conclusion of the argument, I have been unable to discover any authorities which could throw any additional light upon the question. It is said that we are not at liberty to act upon the truth, but that we are constrained by a positive rule of law to hold that the conviction of the prisoners took place on the first day of the assize. If the argument is well founded, the doctrine must equally apply to *bonâ fide* purchases made under the circumstances alluded to by my Brother Maule. The consequences are so absurd as to induce one to doubt the soundness of the rule suggested. I agree with my Brother Maule in thinking, that, though for some purposes the whole assizes and the whole term are to be considered as one legal day, the court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days, or even of a fraction of a day. I therefore think it was competent to the plaintiff in this case to show that the assignor's conviction actually took place on a day posterior to the date of the assignment, and that, to do so, was not in any degree to contradict the record.

Rule discharged.

**\*WILLIAM BEER v. ADAM WARREN BEER. Feb. 5. [\*60**

The statute of apportionment, 4 W. 4, c. 22, does not apply as between the personal representative and the heir of a tenant in fee.

A. and B., tenants in common in fee, made a joint demise of land to C., with a general reddendum, not saying to whom the rent was payable. A. died on the 15th of March, 1848, and B. received the half-year's rent due at the following Lady-Day, less 12s. 6d., which he deducted as the share of A.'s heir, for the period between A.'s death and the time the half-year's rent became due:—Held, that, although the words of the demise were joint, the reversions were several, and the rent followed the reversions; and, consequently, that the heir of A. was entitled to the moiety of the half-year's rent accruing at Lady-Day, 1848, and might maintain an action of account against B., as bailiff, upon the statute 4 Anne, c. 16, s. 27, for receiving more than his just share.

Held, also, on motion in arrest of judgment, that the declaration was good without an averment that a reasonable time had elapsed between the request to account and the commencement of the action.

THIS was an action of account. The declaration stated that one Thomas Beer was seised in his demesne as of fee of and in one undivided moiety or half part, the whole in moieties to be divided, of and in certain closes or pieces or parcels of land, with the appurtenances, to wit, Cribhouse Common, Inner Cribhouse Common, Lower Furzey Piece, Higher Furzey Piece, and Little Common, situate in the parish of Leigh, in the county of Dorset, and, being so seised of and in one undivided moiety or half part, the whole in moieties to be divided, of and in the said closes or pieces or parcels of land, with the appurtenances, as aforesaid, he the said Thomas Beer afterwards, to wit, on the 8th of March, 1848, died seised thereof; whereupon and whereby the said undivided moiety or half part of and in the said closes or pieces or parcels of land, with the appurtenances, then descended and came to the plaintiff, as son and heir of one William Beer, who was brother of the said Thomas Beer; and thereby he the plaintiff then became, and from thence for a long space of time, to wit, hitherto, was seised of and in the same undivided moiety or half part, the whole in moieties to be divided, of and in the said closes or pieces or parcels of land, with the appurtenances, in his demesne as of fee; and the defendant, during all the time aforesaid, held the said closes or pieces or parcels of land, with the appurtenances, with the plaintiff, as tenants in common: and the defendant had \*also, during all the time aforesaid, [\*61 the care and management of the whole of the said closes or pieces or parcels of land, with the appurtenances, to receive and take the rents, issues, and profits thereof, and, as bailiff of the plaintiff of what he received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when the defendant should be thereunto afterwards requested, according to the form of the statute in that case made and provided: and, although the defendant, during the time aforesaid, received more than his just share and proportion of the rents, issues, and profits of the said closes or pieces or parcels of land, with the appurtenances, and

the plaintiff's share thereof, that is to say, the whole of the rents, issues, and profits of the said closes or pieces or parcels of land, with the appurtenances; yet the defendant, although he was afterwards, to wit, on the 18th of October, 1849, requested by the plaintiff so to do, had not yet rendered a reasonable account to the plaintiff of the said rents, issues, and profits so received as aforesaid, or either of them, or any part thereof, or of the said share of the said plaintiff, or any part thereof, but had hitherto wholly neglected and refused so to do, contrary to the form of the statute in that case made and provided; wherefore the plaintiff said he was injured, and had sustained damage to the value of 100*l.*, and therefore he brought suit, &c.

The defendant pleaded,—First, that the said Thomas Beer was not seised of any such undivided moiety of the said several closes or pieces or parcels of land, with the appurtenances, in the declaration mentioned, or of any or either of them, as the plaintiff had above thereof in his said declaration alleged; concluding to the country.

Secondly,—that the said several closes, pieces, or parcels of land, with the appurtenances, in the declaration mentioned, did not, nor did \*62] any or either of them, \*descend or come to the plaintiff as son and heir of the said William Beer, in the declaration alleged to have been the brother of the said Thomas Beer, in manner and form as the plaintiff had above thereof alleged, or in any other manner whatsoever; nor was the plaintiff ever seised in his demesne as of fee of and in the said undivided moiety or half part of or in the said closes, pieces, or parcels of land, with the appurtenances, or of any or either or any part thereof, in manner and form as the plaintiff had above in that behalf in his said declaration alleged; concluding to the country.

Thirdly,—that he the defendant did not hold the said closes, pieces, or parcels of land, with the appurtenances, or any or either of them, or any part thereof, together with the plaintiff, as tenants in common, in manner and form as the plaintiff had above in his said declaration in that behalf alleged; concluding to the country.

Fourthly,—that he the defendant had not, during the said time in the declaration mentioned, or at any other time, the care and management of the whole of the said closes or pieces or parcels of land, with the appurtenances, or of any or either or any part thereof, to receive and take the rents, issues, or profits thereof, or, as bailiff of the plaintiff, of what he received more than his just share and proportion of the same, to render a reasonable account of the same to the plaintiff, and his just share thereof, in manner and form as the plaintiff had above in his said declaration in that behalf alleged; concluding to the country.

Fifthly,—that he the defendant never did receive more than his just share and proportion of the rents, issues, and profits of the said closes, pieces, or parcels of land, with the appurtenances, or of any or either

or any part thereof, in manner and form as the plaintiff had above in his said declaration in that behalf alleged; concluding to the country.

\*Sixthly,—that he the defendant was not, on the day and [\*63 year, in that behalf mentioned in the declaration, or at any time before the commencement of this suit, reasonably requested by the plaintiff to render any account to the plaintiff of the said rents, issues, and profits so received as in the said declaration mentioned, in manner and form as the plaintiff had above in his said declaration in that behalf alleged; concluding to the country.

Seventhly,—that he the defendant, theretofore, to wit, when and so soon as he was thereunto requested by the plaintiff, and before the commencement of this suit, to wit, on the 18th of October, 1849, did duly render a reasonable account to the plaintiff of all rents, issues, and profits received by the defendant, being more than his just share, and of the said share of the plaintiff, according to the form of the statute in such case made and provided,—verification.

The plaintiff joined issue on the first six pleas, and replied to the last, that he the defendant did not render a reasonable account to the plaintiff, of the rents, issues, and profits in the declaration mentioned, in manner and form as the defendant had above in his said last plea in that behalf alleged; concluding to the country. Issue thereon.

The cause was tried before Lord Campbell at the Dorchester Summer Assizes, 1851, when the following facts appeared in evidence:—

In the year 1833, the defendant Adam Warren Beer, and his brother Thomas Beer, the uncle of the plaintiff, purchased of one Kellaway the property in question, consisting of about thirty-four acres of freehold land on Pounts Common, for the sum of 600*l.*; and the same was conveyed to them by indentures of lease and release of the 27th and 28th of December, 1833, *as tenants in common*, in fee.

\*On the 31st of January, 1845, by articles of agreement made [\*64 “between Thomas Beer and Adam Warren Beer, *for themselves and the survivor of them*, their heirs, executors, and administrators, of the one part, and Benjamin Neal, for himself, his heirs, executors, and administrators, of the other part,” the land in question, together with about sixty acres of copyhold land, was demised to Neal for five years from the 25th of March then next, if the estate and interest of the said Thomas Beer and Adam Warren Beer should so long continue, at the yearly rent of 135*l.*, payable half yearly, on the 29th of September and the 25th of March in every year, the first half-yearly payment of such rent to be made on the 29th of September next ensuing. The agreement contained a covenant by Neal to “well and truly pay the said rent of 135*l.* at the time and in manner aforesaid,” and various other covenants regulating the mode of enjoyment of the demised land, and also an agreement, that, “if, at the expiration of any half-year during the said term, there shall be only due from the said Benjamin

Neal one half-year's rent for the said premises, that then and in such case, but not otherwise, the said Thomas Beer and Adam Warren Beer shall allow to the said Benjamin Neal three calendar months for payment thereof, and shall not take any means to recover the same in the mean time, provided there is always sufficient stock on the farm to answer the rent."

Thomas Beer died on the 15th of March, 1848, leaving the plaintiff, his nephew, his heir-at-law.

Neal, the tenant, who was called as a witness, proved, that, when he paid the defendant the half-year's rent due at Lady-Day, 1848, the defendant left 12*s.* 6*d.* in his hands, observing that there would be a question as to the part called Pounts Common; and that, when the half-year's rent due respectively at Michaelmas, 1848, and Lady-Day, \*65] 1849, were paid, the defendant on each occasion \*left in his hands 6*l.* 10*s.* for the moiety of the rent in respect of the closes on Pounts Common. Neal stated that Pounts Common was not worth more than 15*l.* or 20*l.* a year.

On the part of the defendant, it was insisted that there was no case to go to the jury,—that this was not the case of one tenant in common being bailiff of the other within the statute 4 Anne, c. 16, s. 27,—that the two having demised jointly, the right to receive the rent, and the power to enforce it, at law, survived to the surviving tenant in common, though in equity he would be trustee for the party entitled to the share of the other tenant in common,—and that the evidence showed that the defendant had not received more than his share.

His lordship said that the plaintiff and defendant were clearly tenants in common; that the question was, whether or not the defendant ought to account; that, if he had not received too much he would have the benefit of that fact under the judgment; that, as to the first half-year's rent accruing since the death of Thomas Beer, he clearly did receive more than his share, for he received all but 12*s.* 6*d.*; and that, as to the subsequent half-years, he had taken upon himself to assess and apportion the rent of Pounts Common, leaving 6*l.* 10*s.* on each occasion in the tenant's hands; and that this he had no right to do.

The jury returned a verdict for the plaintiff upon all the issues.

*Butt*, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He cited *Wheeler v. Horne*, Willes, 208, *Eason v. Henderson*, 12 Q. B. 986 (E. C. L. R. vol. 64), and *Sturton v. Richardson*, 13 M. & W. 17,† and also the statutes of apportionment, 11 G. 2, c. 19, s. 15, and 4 & 5 W. 4, c. 22, s. 2. He also moved to arrest the judgment, \*66] on the ground, first, that the declaration was \*defective, in merely setting out the *plaintiff's* title, and not showing, as in *Eason v. Henderson*, the title of the *defendant*, but merely averring that the defendant held the premises with the plaintiff, as tenants in common.

[MAULE, J.—The declaration might have been bad on demurrer, as containing a defective statement of the defendant's title: but it is *some* statement. How can the plaintiff know the defendant's title?] He must know the title of his co-tenant; otherwise he could not charge him in account. At all events, the declaration is bad, for not alleging that a reasonable time for rendering an account elapsed after the demand and before the commencement of the action.

The rule having been granted generally,

*Ball* and *Hake* now showed cause.—There was no misdirection. The 27th section of the 4 Anne, c. 16, which is given in lieu of the remedy in equity, enacts “that actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint-tenant, and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant or tenant in common.” Under that statute, the defendant was clearly bound to account to the plaintiff for the moiety of the rent in question which descended to him as heir to Thomas Beer. The statutes of apportionment clearly do not apply to this case. The 15th section of the 11 G. 2, c. 19, enacted, “that, where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant \*for life [67 shall and may in an action on the case recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or, if before such day, then a proportion of such rent according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.” Then came the 4 & 5 W. 4, c. 22, the 1st section of which, reciting the above provision, and reciting that doubts had been entertained whether it applied “to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act, and it is therefore desirable that such doubts should be removed by a declaratory law;” and further reciting, that, “by law, rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources, by

the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands, and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy:" it then proceeds to enact "that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the \*death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act." And the 2d section enacts, "that all rents-service reserved on any lease by a tenant in fee or for any life [less] interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner, that, on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, &c., and other payments, being made; and that every such person, his or her executors, administrators, and \*69] assigns, shall have such and the same remedies at law \*and in equity for recovering such apportioned parts of the said rents, annuities, &c., when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, &c., if entitled thereto; but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which

such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity." *Browne v. Amyot*, 3 Hare, 173, is a distinct authority to show that that statute applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but does *not* apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person, whose interest is not terminated at his death: and that case is cited with approbation in *Sugden's Vendors and Purchasers*, 11th ed. Vol. 1, p. 220.

Thomas Beer and Adam Warren Beer being tenants in common, the right of the former upon his death descended to the plaintiff, and he was entitled to a moiety of the half-year's rent accruing at the Lady-Day next after such death. Where tenants in common join in making a lease, though they use joint words, the lease operates in law as the separate lease of each for his moiety; the estates are several, and the reversions several; 1 Rolle Abr. *Estoppel* (B), pl. 4, p. 877; Bac. Abr. *Joint-Tenants* (H); Co. Litt. 45 a, 197 a; Knight's Case, \*Sir F. Moore, 199, 202; Justice Windham's Case, 5 Co. Rep. [\*70 7; Mallory's Case, 5 Co. Rep. 111 b; Heatherley d. Worthington v. Weston, 2 Wils. 232; Challoner v. Davies, 1 Lord Raym. 404. [MAULE, J.—Do you say, that, if two tenants in common grant a lease purporting to be a joint lease, that will enure as a reservation in respect of the several reversions?] The authorities are distinct to that effect. In Littleton, § 314, it is said: "If there be two tenants in common of certain land, in fee, and they give this land to a man in tail, or let it to one for term of life, rendering to them yearly a certain rent, and a pound of pepper, and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant maketh rescous: in this case, as to the rent and pound of pepper, they shall have two assizes, and as to the hawk or horse but one assize. And the reason why they shall have two assizes as to the rent and pound of pepper is this, insomuch as they were tenants in common in several titles, and when they made a gift in tail or lease for life, saving to them the reversion, and rendering to them a certain rent, &c., such rent is incident to their reversion; and for that their reversion is in common and by several titles, as their possession was before, the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And insomuch as the reversion is to them in common by several titles, it behoveth that the rent and the pound of



pepper, which may be severed, be to them in common and by several titles. And of this they shall have two assizes, and each of them in his assize shall make his plaint of the moiety of the rent and of the moiety of the pound of pepper. But of the hawk or of the horse, which cannot be severed, they shall have but one assize; for, a man \*71] cannot \*make a plaint in an assize of the moiety of a hawk, nor the moiety of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in gross by divers titles, &c." In *Platt on Leases*, 136, it is said, that, "where tenants in common concur in granting a lease, each of them usually demises according to his respective estate and interest, the instrument containing one habendum of the whole estate, but a separate reddendum to each of the lessors, and a separate covenant for payment of the rent. But, as, under a lease in this form, the lessors *must* bring separate actions of debt for their respective portions of the rent, or of covenant for damages in respect of their several shares, a course of proceeding harassing to the lessee, without a corresponding advantage to the lessors, it seems better that the demise should be joint, with one reddendum of the entire rent to the lessors, simply, which will not prevent their taking it as tenants in common, the rent following the reversion (*Litt. § 314*, *Co. Litt. 197 a*), and a covenant with them for payment, in which case they may join in an action of covenant, or sue separately in debt, at their option." In *Doe d. Poole v. Errington*, 1 Ad. & E. 750 (*E. C. L. R.* vol. 28), 3 N. & M. 646, it was held that a count in ejectment, laying a joint demise by two, is not supported by proving the two to be entitled as tenants in common. The absolute value of Pounds Common was not very accurately ascertained. But it may be assumed to have been 20*l.* or 25*l.* a year. The defendant received the entire half-year's rent which accrued due at Lady-Day, 1848, less 12*s.* 6*d.*, which he allowed to remain in the tenant's hands. [WILLIAMS, J.—If the other side can show that this was a joint-tenancy, or that Sir J. Wigram and Lord Campbell were wrong in the view they took, they will succeed upon this rule; otherwise, not.]

\*72] As to the form of the declaration,—None of the \*precedents ancient or modern (with a single exception) contain the averment for the want of which it is suggested that this declaration is bad; see 1 *Went. Pl. Account*, pp. 81—89; *Wheeler v. Horne, Willes*, 208; *Godfrey v. Saunders*, 3 *Wils.* 78; *Baxter v. Hozier*, 5 *N. C.* 288, 7 *Scott*, 233. It is true, the pleader, in *Eason v. Henderson*, 12 *Q. B.* 986 (*E. C. L. R.* vol. 64), has thought fit to insert an averment "that a reasonable time has elapsed since such request, and before the commencement of the action:" but there is nothing in the statute of Anne to warrant it.

*Butt and Ffooks*, in support of the rule.—The judgment of Erle, J., in *Doe d. Campbell v. Hamilton*, 13 *Q. B.* 977 (*E. C. L. R.* vol. 66),

contains very convincing reasons to show, that, where there is a joint demise by two tenants in common, both must join in enforcing it, or the right passes to the survivor. That case expressly overrules *Doe d. Poole v. Errington*. [MAULE, J.—Does Mr. Justice Erle refer to *Gyles v. Kempe*, 1 Freem. 235, which is directly in point with *Doe d. Poole v. Errington*?] He does not. At all events, if the co-tenant in common is not entitled by survivorship, he is clearly entitled to take the rent as trustee for the person beneficially interested. In *Anderson v. Martindale*, 1 East, 497, it was held, that a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, was a joint covenant to A. and B., in which they had a joint legal interest, although the benefit were for A. only; and therefore, on the death of A., the right of action survived to B., and A.'s administrator could not sue on the covenant. *Bradburne v. Botfield*, 14 M. & W. 559,† is also an authority to show that the right to sue upon the covenants in this lease would survive to the defendant. The whole [\*73 \*scope of this lease shows that it was intended to be a joint demise: all the covenants of the tenant are with the two lessors, with the exception of the reddendum, which is general. [MAULE, J.—Yielding and paying to the persons entitled to the reversion.] In *Wallace v. M'Laren*, 1 M. & Ry. 516, it was held, that, upon a lease by tenants in common, the survivor might sue for the whole rent, although the reservation be to the lessors according to their several and respective interests therein. [WILLIAMS, J.—The remark there, that the survivor may sue for the whole, is unnecessary to the decision.] This being a joint demise, according to the decision of the Exchequer Chamber in *Wetherell v. Langston*, 1 Exch. 634,† both lessors must clearly have joined in an action upon it. [MAULE, J.—That only confirms what was decided in the last case, viz. that, where two jointly demise, they must sue jointly, unless that is dispensed with by the act of the law, as in the case of survivorship.] In *Foley v. Adenbrooke*, 4 Q. B. 197 (E. C. L. R. vol. 31), 3 G. & D. 64, a declaration, in covenant at the suit of E., stated, that F. and W. demised lands and iron mines of one undivided moiety of which F. was seised in fee, to the defendant for a term of years, the defendant covenanting with F. and W., and their heirs, &c., to erect and work furnaces, to repair the premises and work the mines; and that F. died, and that the plaintiff was F.'s heir: and breaches of the covenants were assigned, committed since F.'s death. Upon a plea, that W. survived F., it was held, on demurrer, that the action brought by E. without W. could not be maintained. Lord DENMAN, in delivering the judgment of the court, there says: "Several cases were cited upon the argument,—*Anderson v. Martindale*, 1 East, 497, *James v. Emery*, 8 Taunt. 245 (E. C. L. R. vol. 1), 2 J. B. Moore, 195 (E. C. L. R. vol. 4), *Kitchen v. Buckley*, 1

Lev. 109, *Harrison v. Barnby*, 5 T. R. 246, *Eccleston v. Clipsham*, 1 Saund. 153, and others,—which it is not \*necessary more particularly to refer to. But the result of the cases appears to be this, that, where the legal interest *and cause of action* of the covenantees are *several*, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay *separate rents* to tenants in common upon demises by them; or, as in the instance cited from *Slingsby's Case*, 5 Co. Rep. 18 b, in note (1) to the case of *Eccleston v. Clipsham*, 1 Saund. 155, where a man by indenture demised Blackacre to A., Whiteacre to B., and Greenacre to C., and covenanted with them, and each of them, that he had good title, each might maintain an action for his particular damage by a breach of that covenant. On the other hand, it appears from several cases, that, *if the cause of action be joint*, the action should be joint, though the *interest be several*: *Coryton v. Lithebye*, 2 Saund. 115; *Martin v. Crompe*, 1 Lord Raym. 340, Comb. 474, 1 Salk. 444; *Wilkinson v. Hall*, 1 N. C. 718, 1 Scott, 675. In the present case, the covenants for breach of which the action is brought are such as to give the covenantees *a joint interest in the performance of them*: and the terms of the indenture are such that it seems clear that the covenantees *might* have maintained a joint action for breach of any of them. Upon this point, the case of *Kitchen v. Buckley*, 1 Lev. 109, is a clear authority: and the case of *Petrie v. Bury*, 3 B. & C. 353, 5 D. & R. 152, shows that, if the covenantees *could* sue jointly, they are bound to do so." These authorities show that the defendant received the rent in question in the character of covenantee, and not as bailiff, and therefore that this action is not maintainable. That the demise was intended to be joint, is clear from the whole tenor of it. In the first place, it is expressed to be made "between Thomas Beer and Adam Warren Beer, *for themselves and the* \*75] *survivor of them*, \*and Neal;" and the tenant, amongst other things, covenants not to assign or underlet without the consent in writing of both the lessors; and further to pay to the two, previously to taking possession, the sum of 10*l.* for certain manure.

There are many cases in which the declaration has been held bad, in arrest of judgment, for want of an averment that a reasonable time has elapsed for doing the thing the omission to do which is complained of, and the like; as in *Morton v. Lamb*, 7 T. R. 125, *Stavart v. Eastwood*, 11 M. & W. 197,† *Burton v. Griffiths*, 11 M. & W. 817.† In *Eason v. Henderson*, 12 Q. B. 986 (E. C. L. R. vol. 64), the declaration did contain an allegation that a reasonable time had elapsed since the request, and before the commencement of the action: and that averment was not idly inserted: it is of the very essence of the thing, that the bailiff should have a reasonable time allowed him for making the account, before the action is brought against him; if not,

there could be no need of the averment of a request. [MAULE, J.—A man is bound to pay a debt without request; but, under this statute, a bailiff is not bound to account until request. It may be that time is involved in the averment of a refusal to give a reasonable account: so that, unless the defendant omits to do something which is reasonable, he cannot be said to have been guilty of any default. WILLIAMS, J.—In *Barker v. Thorold*, 1 Saund. 47, where the pleadings are set out at length, the breach assigned for not accounting is averred on request; nothing is said about reasonable time; and Saunders, who was not likely to have overlooked any objection to a declaration, does not notice that as a defect.] A tenant in common who is charged as bailiff under the statute, is not like a bailiff at common law; *Wheeler v. Horn*, Willes, 208: he has deductions to make for expenses and disbursements.

\*MAULE, J.—I am of opinion that this rule should be discharged. It was moved on the ground of alleged misdirection, [\*76 and also for supposed defects in the declaration. The defects in the declaration were said to be two; the first was, that the title of the defendant was insufficiently alleged. That, however, was not much pressed, and clearly is quite untenable. The second objection insisted upon, was, that there was no averment in the declaration that a reasonable time had elapsed after the defendant had been required to account, and before the commencement of the action. Now, the declaration states the title of the plaintiff to an undivided moiety of the lands in question as tenant in common with the defendant; it then states that the defendant had the care and management, to take the rents and profits of the land, and, as bailiff of the plaintiff of what he received more than his just share, to render a reasonable account thereof to the plaintiff, and his share thereof, when thereunto requested; and it then by proper averments brings the defendant within the statute of Anne, which makes one tenant in common receiving more than his share, bailiff of the other tenant in common,—the effect of the statute as to that being to place him in the situation of an ordinary bailiff. The declaration pursues the form to be met with in all the old precedents, and there is only one modern one,—*Eason v. Henderson*, 12 Q. B. 986 (E. C. L. R. vol. 64),—where the averment which is said here to be necessary is found. I think it is quite reasonable to omit it. The reasonableness of the account to compel the render of which the action is brought, may be considered to involve reasonableness with respect to time as well as other things. I think the liability to account thrown by the law upon the bailiff, imposes upon him a duty to be ready to account when called upon. By accepting the office of bailiff, or, as here, receiving more than his just share, he must be taken to have placed himself in a position \*to be compelled to account upon demand. This certainly is not a case for an arrest of judgment, [\*77

which is only allowed where the declaration is clearly bad. I cannot say that I entertain the slightest doubt as to the propriety of the form of declaration here adopted.

Then it is said that there was a misdirection; for, that the Lord Chief Justice ought not to have left it to the jury to say whether or not the defendant had received more than his just share. It appears that the land in question was held by the tenant with other land under one joint demise from the defendant and the ancestor of the plaintiff, who were tenants in common in fee, at one entire rent for the whole. The defendant had received two half-years' rent since the death of his co-tenant Thomas Beer. There was conflicting evidence as to the value of Pounds Common: but I think it may be taken to have been 25*l.* per annum. As to the last half-year, it appeared that the defendant had not received the whole by 6*l.* 10*s.* The plaintiff's share would be the moiety of the half-year's rent, viz., 6*l.* 5*s.* As to that half-year, therefore, there has been no receipt of rent by the defendant beyond his proper share: consequently he is not chargeable as bailiff as to that. But with respect to the half-year accruing immediately after the death of Thomas Beer, the defendant took the whole rent, minus 12*s.* 6*d.* If, therefore, the plaintiff was entitled to receive more than 12*s.* 6*d.* in respect of that half-year, there was evidence that the defendant had received more than his just share, and the direction was correct. As to that 12*s.* 6*d.*, the defendant probably thought that the statute of apportionment applied, and that the plaintiff's right to the rent, as between him and the executor, would be such a proportion only as would accrue between the day of the death of Thomas Beer and Lady-Day, 1848. If it was competent to the defendant so to apportion the rent, \*78] then 12*s.* 6*d.* would certainly be enough. But I am \*clearly of opinion that such apportionment cannot take place. The whole scope and object of the 4 & 5 W. 4, c. 22, seems quite beside any dealing or interference with the rights of the tenant in fee, as between him and the personal representative of his ancestor. That struck me as the proper view, when I first read the statute; and I am confirmed in that impression by the decision of Sir James Wigram, V. C., in *Browne v. Amyot*, 3 Hare, 173, of the soundness of which I cannot entertain a doubt. I therefore think there could be no apportionment, and that the plaintiff, if entitled to anything, was entitled to the moiety of that half-year's rent.

But it was insisted that the plaintiff in this case was not entitled to anything, because the right to the rent (at law, at least), survived to the defendant, who alone had a right to receive the whole. Several cases were cited for the purpose of showing, that, whatever the nature of the subject of contract, if the instrument does in terms necessarily import that the promise or the covenant is made jointly with two, then the two covenantees, or the survivor, must bring the action. That is,

I think, very sound law; and it is beside the class of cases where the covenant, which from its language might be either joint or several, has been held to be joint or several according to the interests of the covenantees. You are not to impose upon the instrument a meaning contrary to the true sense of the words, but choose between two senses, of both of which the words are susceptible, and adopt that which is most conducive to the interests of the covenantees. But, where the covenant is not capable of being so construed, however severable the interests of the covenantees may be, if the language they have used evinces an intention that the covenant shall be joint, all must join in an action upon it, or the right passes to the survivor; as was held in the case of *Wetherell v. \*Langston*, 1 Exch. 634,† where Wilde, [\*79 C. J., in delivering the judgment of the court of error, lays down good and sound reasons for that doctrine. Applying those principles to the present case, what is the nature of this instrument? By it the parties demise a number of tenements, of which the premises called Pounts Common formed a part. Is there any covenant to pay the rent to any particular person? No: the whole right to the rent arises from the *reddendum*, which studiously leaves unnamed the persons to whom the payment is to be made. This is left to the law. It means that the yielding and paying shall be to the persons legally entitled, viz., the reversioners. This is an action of a local nature, arising out of the nature of the title. It is the title in respect of which the rent accrues. Nobody could pretend, that, upon the reversion passing to a third person by purchase or by descent, any but the person entitled to the reversion could be entitled to the rent. It seems to me, therefore, that this contract differs clearly from those I before alluded to. But it is said that there are certain covenants in the lease which tend to show that this was intended to be a joint contract, viz., the covenant not to assign without the consent in writing of the two lessors, and the covenant to pay to *them* 10*l.* for certain manure, before taking possession. I do not, however, think that these isolated provisions can impose any other than their natural meaning upon the words used in the other parts of the lease, or show that the literal construction ought not to prevail. It follows, therefore, that, upon the descent of the moiety of the reversion to the plaintiff, he became entitled to a moiety of the rent when it accrued. He was entitled to a moiety of the half-year's rent which became due on the 25th of March, 1848. The defendant received the rent, and therefore must be taken to have received a sum on behalf of the plaintiff, which amounted to more than 12*s.* 6*d.* In other words, \*the defendant received more than his share. [\*80 Upon the whole, I think the case was properly left to the jury, and that the plaintiff was entitled to the verdict. It is much to be lamented that there should be so expensive and so complicated a litiga-

tion for so small an amount: but we cannot help that. The rule must be discharged.

WILLIAMS, J.—I am of the same opinion. As to the arrest of judgment,—None of the older precedents contain an averment that a reasonable time had elapsed after the demand of an account, and before the commencement of the action; and I am unwilling to sanction a notion that any such averment is requisite. I do not see that any greater practical inconvenience can arise from our so holding, than exists in every case where a man is bound to contract to pay money on request. As to the first ground of the motion for a new trial, the real question is, whether the decision of Sir James Wigram, in *Brown v. Amyot*, is right or not. It is the deliberate judgment of a very able judge; and I must confess I cannot see any reason for doubting that he came to a correct conclusion. This brings us to the important question in the case: and it certainly does seem strange, that, though it has been the subject of much controversy, there should be no *express* decision upon it; although, when the authorities are carefully looked at, it seems to me that they leave the matter without any doubt. The lease upon which the question arises was made by two persons, Thomas Beer and Adam Warren Beer, who were tenants in common of the land, though that fact does not appear upon the face of the instrument. One of them dies: and it is said that the consequence is, that the right to receive the entire rent survives to the other of them. I see no foundation for that: I think it is perfectly clear that the moiety of the deceased tenant in common goes to his real representative, and not to the \*81] survivor. Such a lease, it appears, has been considered to be the lease of each for his respective share. In Comyn's *Landlord and Tenant*, p. 22, it is said: "Tenants in common, having several and distinct estates, cannot make a joint lease of the whole estate; but such lease shall be taken to be the lease of each for his respective share, and the cross confirmation of each for the part of the other, with no estoppel on either part." And this seems to be fully warranted by the authorities which are cited.<sup>(a)</sup> There are many others to the same effect. In *Vin. Abr. Estoppel* (B. a.) pl. 3, 4, it is said: "If A. is seised of ten acres, and B. of other ten acres, and they join in a lease for years by indenture, these are several leases according to their several estates, and the indenture shall not estop him, inasmuch as it passes by way of interest." *Co. Litt.* 45 a. "So, if two tenants in common of land join in a lease for years by indenture, yet those are several leases, and no estoppel, for the cause aforesaid." So, in *Joules v. Joules*, 1 *Brownlow*, 39, it is laid down, that, "if two tenants in common join in a lease for years, to bring an ejectment, and count *quod cum dimisissent*, &c., that is naught, for, it is a several lease of their

(a) 1 *Rolle Abr.* 877, l. 48, 52, *Estoppel* (B), pl. 3, 4; *Bac. Abr. Joint-Tenants* (H), pl. 1; *Mantle v. Wollington*, *Cro. Jac.* 166; *Heatherley d. Worthington v. Weston*, 2 *Wils.* 232.

moieties; and they declare quod cum one of them demised one moiety, and the other the other moiety, and good." To the same effect are *Cradock v. Jones*, 1 Brownlow, 134, and *Gyles v. Kempe*, 1 Freem. 234. These several cases show that *Doe d. Foole v. Errington*, 1 Ad. & E. 750, 3 N. & M. 646, is founded upon ample authority, and is sound law. If so, no doubt exists, that, upon the death of Thomas Beer, his moiety belonged to the plaintiff, his nephew and heir, who was consequently entitled to the half of the half-year's rent received by the defendant on the 25th of March, 1848. \*Lord Campbell was [\*82 right, therefore, in telling the jury that the defendant had received more than his share. For these reasons, I concur with my Brother Maule in thinking that this rule should be discharged.

TALFOURD, J.—Having only heard a part of the argument, I shall only say that the learned arguments I have heard to-day have not induced me to doubt that the conclusion to which my two learned Brothers have come, and the reasons they have assigned, are well founded.

Rule discharged.



Judgment quod computet was signed on the 17th of February, 1852, and in the following Easter Term, *Hake*, for the plaintiff, moved that auditors be assigned to take the account between the parties, and at a time to be appointed. *Ffooks*, for the defendant, consenting, the court assigned Mr. Ray and Mr. Park, two of the masters, and the following rule was thereupon drawn up:—

"Beer v. Beer. In account. Tuesday, April the 27th, 1852, upon hearing counsel on both sides, and with their consent, It is ordered, that H. B. Ray and A. A. Park, Esquires, two of the masters of this court, be, and they are hereby, appointed and assigned auditors to take the account between the said parties in this cause: and that the said auditors do proceed to take such account on Monday, the 3d day of May next, at the hour of 11 o'clock in the forenoon, in the said masters'-room at Westminster-Hall, in the county of Middlesex, and so from day to day at every day and place by the said auditors to be assigned to him the said defendant, until the account aforesaid shall be finished; the said defendant, by his counsel, hereby undertaking \*to attend the said auditors at such time and place, accordingly; [\*83 and also to appear before this court on Wednesday, the 26th day of May next, on which day the said auditors the account aforesaid here in court shall deliver, and so from day to day, at every day to the said defendant by the court here to be assigned, until the plea thereupon be determined, and judgment thereof shall be given."

On Saturday, May 1st, 1852, *Ffooks* moved for an enlargement of the time for the defendant's appearance before the auditors, on the ground that he was disabled by illness from coming to London.



*Hake*, contra, submitted that the court had no authority to do what was asked, the auditors being the judges, and not the court. JERVIS, C. J., referring to the rule, observed that that gave the Court ample jurisdiction: whereupon, *Hake* disclaiming having had any such intention when he consented to the rule, the court directed that that rule should be rescinded, and that a fresh rule should be drawn up, merely appointing the auditors.

The rule was accordingly so drawn up, but it was never applied for, the defendant having died shortly afterwards.

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As to the action of account render as between *Irvine v. Hanlin*, 10 Serg. & R. 231; *M'Adam* tenants in common: *Sargent v. Parsons*, 12 v. Orr, 4 Watts & Serg. 550. *Mass.* 149; *Sherman v. Ballan*, 8 Cowen, 304;

#### END OF HILARY VACATION.

\*84]

#### \*MEMORANDA.

IN the course of Hilary Vacation, Lord TRURO resigned the office of Lord High Chancellor of England, and was succeeded by Sir EDWARD BURTENSHAW SUGDEN, who was created a Peer, by the title of Baron ST. LEONARDS.

Sir *Alexander James Edmund Cockburn* and Sir *William Page Wood*, at the same time, resigned their respective offices of Attorney and Solicitor-General. They were succeeded by Sir *Frederick Thesiger* and Sir *Fitzroy Kelly*.

Sir JOHN PATTESON, one of the Judges of the Court of Queen's Bench, resigned his seat, and was appointed a Privy Councillor.

CHARLES CROMPTON, Esq., of the Inner Temple, was appointed a Judge of the Court of Queen's Bench in the room of Sir JOHN PATTESON. He gave rings with the motto, "Quære verum."

CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS  
AND IN THE  
EXCHEQUER CHAMBER,  
IN  
Easter Term,  
IN THE

FIFTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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The Judges who usually sat in Banco during this Term were:

JERVIS, C. J.  
CRESSWELL, J.

WILLIAMS, J.  
TALFOURD, J.

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GRAHAM and Another, Assignees of LARKE, a Bankrupt, v.  
CHAPMAN. *May 7.*

A trader, in consideration of a past debt of 240*l.*, and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer:—Held, that, inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy within the statute 12 & 13 Vict. c. 106, s. 67.

THIS was an action of trover brought by the plaintiffs as assignees of one James Bensley Larke, a bankrupt, to recover the value of certain goods of the bankrupt; the first count of the declaration alleging a conversion before, and the second a conversion after the bankruptcy of Larke.

The defendant pleaded, amongst other pleas,—not guilty,—that

\*86] Larke was not possessed,—and that the \*plaintiffs as assignees were not possessed; and upon these pleas issues were joined.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—The bankrupt, Larke, had carried on business as a linen and woollen-draper at Norwich. In the month of March, 1850, being then indebted to the defendant for goods sold, to the extent of 239*l.* 18*s.*, and in great pecuniary difficulty, Larke applied to him for a further advance of 200*l.*, which the defendant agreed to make on condition that Larke would assign to him, as a security for both sums, all his stock in trade and other effects. These terms being assented to by Larke, the 200*l.* was advanced to him by the defendant on the 1st of April, 1850, and on the 8th the following deed was executed:—

“This indenture, made the 8th of April, 1850, between James Bensley Lake, of, &c., of the one part, and James Denny Chapman, of, &c., of the other part: Whereas the said J. B. Larke, on the 1st of April instant, stood justly indebted to the said J. D. Chapman, and on the day of the date hereof still stands justly indebted to the said J. D. Chapman, in the sum of 239*l.* 18*s.*, for goods sold and delivered to the said J. B. Larke previously to the 31st day of March last: And whereas the said J. B. Larke, on the said 1st of April instant, having had particular occasion for the sum of 200*l.*, had applied to the said J. D. Chapman to advance and lend him the same; which the said J. D. Chapman agreed to do upon the said J. B. Larke promising and agreeing to secure to him the said J. D. Chapman, in manner hereinafter mentioned, as well the repayment of the said sum of 200*l.*, as also to secure the payment of the said sum of 239*l.* 18*s.* (and which said sum of 200*l.* the said J. D. Chapman did, in consideration of the aforesaid promise and agreement, advance and lend to the said J. B. Larke

\*87] \*on the said 1st of April instant, as he doth hereby acknowledge): Now, this indenture witnesseth, that, in consideration of the said sum of 239*l.* 18*s.* so due and owing by the said J. B. Larke to the said J. D. Chapman for goods sold and delivered as aforesaid, and also in consideration of the said sum of 200*l.* so due and owing to the said J. D. Chapman for money lent and advanced by him to the said J. B. Larke on the said 1st of April instant as aforesaid,—making together the sum of 439*l.* 18*s.* now due and owing to the said J. D. Chapman by the said J. B. Larke, testified by his executing these presents,—he, the said J. B. Larke, doth hereby grant, bargain, sell, and assign unto the said J. D. Chapman, his executors, administrators, and assigns, *all the stock in trade, goods, implements, and utensils in trade, household furniture, plate, linen, china, glass, books, and also all the chattels real, and all the goods, chattels, and personal estate and effects whatsoever of him the said J. B. Larke, wheresoever being, and whether in possession, reversion, remainder, or expectancy, and all securities therefor (save and*

*except the wearing apparel of the said J. B. Larke and his family, and his household furniture, not exceeding in the whole the sum of 20l., and also save and except the book and other debts owing to the said J. B. Larke*; and all the estate, right, title, interest, term and terms of years, claim, and demand whatsoever of him the said J. B. Larke therein and thereto; to have, hold, receive, and take the hereby assigned premises (except as before excepted) unto the said J. D. Chapman, his executors, administrators, and assigns, with full power for him and them to use the name or names, and act as the attorney or attorneys irrevocable of him the said J. B. Larke, his executors or administrators, in demanding, suing for, recovering, receiving, and giving discharges for the hereby assigned premises, or any part thereof, and for him the said \*J. D. Chapman, his executors, administrators, and assigns, to [\*88 depute one or more attorney or attorneys for the like purpose: And it is hereby declared that the said J. D. Chapman, his executors, administrators, and assigns, shall stand possessed of the said hereby assigned premises, upon trust to convert the same into money, and for that purpose, according to the respective natures thereof, to collect and get in and make sale thereof, whenever he or they shall think proper, either together or in lots, and either by public auction or private contract, with power to buy in the same, or any part thereof, at any auction or auctions, and afterwards to sell the part so bought in, without being liable for any loss to be occasioned thereby, and to convey, assign, or deliver the said premises to the purchaser or purchasers thereof, his, her, or their executors, administrators, or assigns: And it is hereby declared that the said J. D. Chapman, his executors, administrators, or assigns, shall stand possessed of the money to arise by the means aforesaid, upon trust to pay thereout the costs of preparing and perfecting these presents, the charges and expenses attending the conversion into money of the hereby assigned premises, and all other expenses attending the execution of the trusts hereby created, and then to pay or retain unto himself and themselves the said sum of 439l. 18s., with interest therefor at 5 per cent. per annum, to be computed from the date hereof until the time of payment, and then to pay the surplus (if any) unto the said J. B. Larke, his executors, administrators, or assigns: And it is hereby declared, that every receipt of the said J. D. Chapman, his executors, administrators, or assigns, for any of the said purchase-money, shall be a valid discharge to the person or persons paying the same, and shall exempt such person or persons from all responsibility thereabout: And it is hereby expressly declared that the principal sum hereby secured is not to exceed the sum \*of 439l. 18s., and that any assignee or assignees of the said J. D. Chapman, his executors, administrators, or assigns, shall be [\*89 equally competent to execute the aforesaid trusts, or any of them, as if such trusts had been executed by the said J. D. Chapman, his

executors or administrators: And it is hereby further declared, that it shall be lawful for the said J. D. Chapman, his executors, administrators, or assigns, or any person or persons authorized by him or them, and either with or without any peace officer, to enter upon and take possession of all the chattels real hereby assigned, or intended so to be, and therefrom to eject and remove the said J. B. Larke, his executors, administrators, or assigns, and all other persons, and also to enter upon and continue in possession of any hereditaments and premises upon which any part of the goods, chattels, and personal estate hereby assigned may happen to be, and to take possession of such goods, chattels, and personal estate, upon the trusts aforesaid; and that, for the purpose of taking possession of such chattels real, and personal estate as aforesaid, it shall be lawful for him or them to break open or remove any door, window, lock, bar, bolt, or other fastening, without being liable to any action for so doing, or for taking and continuing in possession of the said hereditaments and premises: And it is hereby declared that the said J. D. Chapman, his executors, administrators, or assigns, shall have full power to compound any chose in action hereby assigned or intended so to be: And the said J. B. Larke doth hereby, for himself, his heirs, executors, and administrators, covenant, grant, and agree to and with the said J. D. Chapman, his executors, administrators, and assigns, that he the said J. B. Larke, his executors and administrators, the premises hereby assigned, or intended so to be, unto the said J. D. Chapman, his executors, administrators, and assigns, \*90] against him the said J. B. \*Larke, and his executors and administrators, and all other persons whomsoever, shall warrant and for ever defend: And, further, that the said J. B. Larke, his heirs, executors, or administrators, shall, on or before the 1st of June next, pay unto the said J. D. Chapman, his executors, administrators, or assigns, the sum of 439*l.* 18*s.*, with interest therefor at 5*l.* per cent. per annum, to be computed from the date hereof until payment: And, further, that, in case the said sum of 439*l.* 18*s.* and interest shall not be paid to the said J. D. Chapman on or before the said 1st of June next, it shall be lawful for the said J. D. Chapman, his executors, administrators, or assigns, or any of them, or any person or persons authorized by them, or any of them, at any time or times thereafter, and from time to time until the said sum of 439*l.* 18*s.* and interest shall be fully paid and satisfied, to enter, by any ways or means he or they may think proper, into and upon all and every the hereditaments and premises, with the appurtenances, which may from time to time be in the occupation of the said J. B. Larke, or any part thereof, and for that purpose, if needful, to break open any outer or other door, and then and there distress the goods and chattels there found, for the said sum of 439*l.* 18*s.* and interest; and, in case such sum and interest, together with the costs of taking and keeping such distress, shall not be paid within one

day after the making thereof, it shall be lawful for the said J. D. Chapman, his executors, administrators, and assigns, to sell such goods and chattels, by the appraisement of one or more appraiser or appraisers, or by public auction, and for that purpose to keep possession of the said hereditaments and premises for any time not exceeding twenty-one days, in order that, by means of such distress and sale, the said sum of 439*l.* 18*s.*, and all interest to become due therefor, and all costs of any distress or distresses, may be fully paid and satisfied to \*the said J. D. Chapman, his executors, administrators, and assigns: [\*91] And it is hereby expressly agreed and declared between the said parties, that the said J. D. Chapman, his executors, administrators, or assigns, may plead these presents as a leave and license, or a general release, in bar of any action which may be brought for breaking into, or remaining in or upon, such lands and premises as aforesaid, or any part thereof, or for distraining and selling the goods and chattels there found: And it is hereby declared and agreed, that, until the said J. D. Chapman, his heirs, executors, administrators, and assigns, shall think fit to take possession of the said assigned premises, it shall be lawful for the said J. B. Larke to retain possession thereof."

The 200*l.* was bonâ fide advanced by the defendant to Larke on the 1st of April, though the deed was not executed until the 8th. It was proved, that, at the time when this transaction took place, Larke was in great distress; and that several executions had been issued against him, which the jury found to be fraudulent, but they negatived that the defendant had notice that they had been fraudulently obtained.

The defendant's debt being unpaid, he, on the 7th of August, 1850, seized all the goods on the premises, under the assignment, including about 100*l.* worth of goods which Larke had purchased after the acts of bankruptcy upon which the fiat was founded.

On the part of the plaintiffs, it was insisted that the assignment, having the necessary effect of defeating or delaying creditors, was an act of bankruptcy, within the 67th section of the 12 & 13 Vict. c. 106; and that the seizure was not a "transaction" within the protection of the 183d section, so far, at all events, as related to the goods purchased by Larke after the acts of bankruptcy: and, after the jury had retired to consider their verdict, a third objection was made, viz. that the power \*of distress had not been duly executed, inasmuch as there was [\*92] no evidence that the goods had been sold by auction, or on appraisement.

The Lord Chief Justice left it to the jury to say whether the deed was executed bonâ fide, and whether the advance of the 200*l.* was the moving consideration. The jury found that it was; and his lordship thereupon directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter the verdict for them, with 817*l.*

damages, if the court should be of opinion that the execution of the assignment was an act of bankruptcy.

*Byles*, Serjt., in the last term, moved accordingly, and also for a new trial on the ground that the verdict was against evidence. He referred to *Worseley v. De Mattos*, 1 Burr. 467, *Butcher v. Easto*, 1 Dougl. 294, *Ex parte Marshall*, 1 De Gex, 273, *Scott v. Scholey*, 8 East, 467, *Howes v. Ball*, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288 (E. C. L. R. vol. 17), and *Freeman v. Edwards*, 2 Exch. 732;† and *Williams, J.*, referred to *Ex parte Zwilchenbart*, 3 M. D. & De Gex, 671.

The court granted a rule upon the points reserved, but refused it as to the last point,—the Lord Chief Justice observing that, though, if he had been on the jury, he should probably have found the other way, yet he could not advise the court to grant a rule as for a verdict against evidence.

*Bramwell* and *Willes*, on a former day in this term, showed cause.—  
1. The assignment of the 8th of April, 1850, was not an act of bankruptcy. A conveyance by a trader of all his property to satisfy a pre-existing debt, no doubt, is an act of bankruptcy, inasmuch as it disables \*93] him from continuing his trade, and so necessarily \*defeats or delays his other creditors. But a bonâ fide sale for a present payment, though of all the trader's goods, is not an act of bankruptcy. The authorities upon the subject are numerous, and so clear as to leave the matter free from doubt. Thus, in *Seibert v. Spooner*, 1 M. & W. 714,† Lord Abinger says: "If a man assigns the whole of his effects, not for a new consideration, but for an outstanding debt, that is an act of bankruptcy; because the very nature of the transaction prevents him from carrying on his trade." And Alderson, B., adds: "If an *equivalent* is given, there is only a change of the nature of the property which the party has, but not a conveying of it away." So, in *Linden v. Sharp*, 7 Scott, N. R. 730, 6 M. & G. 895 (E. C. L. R. vol. 40), one M., a trader, being indebted to his bankers, and being pressed by them for security, executed a conveyance to them of certain stock and effects enumerated in a schedule annexed to the deed, with a power of sale on default in payment of 1000*l.* on demand: the deed recited that M. was indebted to the bankers in 1000*l.*, but it contained no stipulation for fresh advances by them; and, though it did not in terms purport to convey *all* M.'s property, it appeared that the agent of the bankers who negotiated the transaction, was aware that M. in reality possessed no other property: M. retained possession of the effects so conveyed until a few days before a fiat in bankruptcy issued against him: and it was held that the execution of this deed was an act of bankruptcy. On the other hand, Lord Kenyon, in *Whitwell v. Thompson*, 1 Esp. N. P. C. 68, says: "All the cases, without a single exception, where the assignment of his property by a trader has been deemed fraudulent

and an act of bankruptcy, have been where it has been given for a by-gone and before-contracted debt: but it never can be taken to be law, that a trader cannot sell his property when his affairs become embarrassed, or assign them to a \*person who will assist him in his difficulties, as a security for any advances such person may make [\*94 to him." This assignment, therefore, is clearly not bad because it conveys *all* Larke's goods. But it is contended on the other side, that the assignment is fraudulent, because it was, as to part, given as a security for a by-gone debt. There is no authority, however, to warrant that. [WILLIAMS, J.—Lord Lyndhurst, in *Ex parte Marshall*, 1 De Gex's B. C. 273, seems to think it would be an act of bankruptcy, unless it was a *sale*.] In *Lindon v. Sharp*, Tindal, C. J., says: "If this had been the case of a conveyance upon a *bonâ fide* purchase by the defendant, the transaction would have been protected, upon the principles laid down in *Baxter v. Pritchard*, 1 Ad. & E. 456 (E. C. L. R. vol. 28), 3 N. & M. 638, *Rose v. Haycock*, 1 Ad. & E. 640, n.; 3 N. & M. 644 (E. C. L. R. vol. 28), and *Harwood v. Bartlett*, 8 Scott, 171, 6 N. C. 61; or, if it had been an assignment by way of security to the bankers for advances thereafter to be made, the observations of Lord Kenyon, in *Whitwell v. Thompson*, 1 Esp. N. P. C. 68, would apply strongly in favour of the defendant: but as it was a security for a by-gone, pre-contracted debt, the language of Lord Kenyon in the last case, and of the judges in the other cases, pointedly applies the principles of the earlier decisions to such a transaction, and confirms the opinion that it is an act of bankruptcy." That is a clear recognition of the distinction which will govern the present case. [JERVIS, C. J.—When did it first become a settled matter of law, that an assignment of all a trader's property was an act of bankruptcy?] In *Worseley v. De Mattos*, 1 Burr. 467.(a) [JERVIS, C. J., referred to *Devon v. Watts*, 1 Dougl. 86.]

2. Then it is said that the deed could only pass such \*property as Larke possessed at the time, and did not justify the seizure of after-acquired property. As to that, the defendant justifies under the leave and license contained in the deed. To this it is objected, that, Larke having committed an act of bankruptcy before the seizure and sale, he could give no leave and license to seize goods which were the property of his assignees. It is submitted, however, that the seizure and sale was a transaction protected by the 133d section of the 12 & 13 Vict. c. 106. That section enacts that "all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before [the] date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of such

(a) The point had before been decided in *Law v. Skinner*, 2 Sir W. Bl. 996, in Easter Term, 15 G. 2: *Worseley v. De Mattos* was decided in Hilary Term, 31 G. 2.



petition, and all conveyances by any bankrupt, bonâ fide made and executed before the date of the fiat or the filing of such petition, and all contracts, *dealings, and transactions* by and with any bankrupt, really and bonâ fide made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale, before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with, or paying to, or being paid by, such bankrupt, or at whose suit or on whose account such execution or attachment shall be issued, had not at the time of such payment, conveyance, contract, *dealing, or transaction*, or at the time of so executing or levying such execution or attachment, or at the time of making \*96] any sale thereunder, notice of any \*prior act of bankruptcy by him committed." The object of the legislature was, to validate all transactions as to the goods of the assignees, provided they would have been valid as against the bankrupt himself if he had not committed an act of bankruptcy. This was a dealing with the goods in pursuance of an authority previously given. The words of the statute are as general in their nature as can be conceived. In *Young v. Hope*, 2 Exch. 105,† a trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth, on payment of a certain sum, but, if the money was not paid on a certain day, the owner should be at liberty to re-take them: the goods continued in the possession of the trader until the stipulated time for payment, when, the money not having been paid, the owner sold them, after an act of bankruptcy committed by the trader, but before the fiat issued: and it was held,—following a rule of Tindal, C. J., at *Nisi Prius*, in *Pariente v. Pennell*, 2 M. & Rob. 517,—that the "transaction" was protected by the 2 & 3 Vict. c. 29, s. 1.(a)

3. The point that the sale was without appraisalment, was not taken until after the jury had retired. If taken at the proper time, evidence might have been given which would have answered the objection.

*Byles*, Serjt., and *Aspland*, in support of the rule.—1. The assignment was clearly an act of bankruptcy. Its necessary effect was, to defeat and delay Larke's other creditors. In *Newton v. Chantler*, 7 East, 138, Lord Ellenborough says: "As a general proposition, it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor, in prejudice to the rest, is an act of bankruptcy. *Every man must be taken to contemplate the ordinary consequences* \*97] *of his own act \*at the time of the act done.* Here the necessary effect of the act done, was to turn round all his other creditors,

(a) See *Graham v. Furber*, post, M. T. 1853.

and prevent them from pursuing their present ordinary remedy against him for the payment of their demands, leaving them only to look to him for the future surplus, if any." Lawrence, J., in the same case, says: "As the necessary consequence of this deed of conveyance, was, to take the whole effects of the trader, which the law says shall be distributed equally amongst all his creditors, and to give them to a particular creditor, this, within all the cases, is an act of bankruptcy." And Le Blanc, J., adds: "The principle of all the cases, is, that, if the conveyance to a particular creditor *necessarily* prevents the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy." The principle of that case is recognised in *Steward v. Moody*, 1 C. M. & R. 777:† it was there held, that, where a trader assigns by deed all his property, in trust for the benefit of his creditors, it was an act of bankruptcy under the 6 G. 4, c. 16, s. 3, although the trader did not intend to defeat or delay his creditors, inasmuch as, that being the necessary consequence of the assignment, he must in law be taken to have intended it. Parke, B., there said: "It was settled by *Robertson v. Liddell*, 9 East, 487, that an assignment of all a trader's effects was an act of bankruptcy. It was there decided that the words 'or whereby,' in the statute of James, did not alter the previous words, 'to the intent,' and that the words, 'to the intent or *whereby* his creditors *shall* or *may* be defeated or delayed,' were to be read 'to the intent his creditors *shall*, or whereby they *may* be defeated.' The present statute is the same in effect, only the expressions are more concise, and the words 'with intent,' &c., occur at the end of the section, as applicable to all the different kinds of acts of bankruptcy mentioned. The present act was not intended to \*alter the former law in this respect; and it has been clearly settled, that, if the necessary consequence of a man's act is, to delay his creditors, he must be taken to intend it. When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy." The same is laid down by Lord Abinger, in *Siebert v. Spooner*, 1 M. & W. 714,† though he gives a different reason. *Butcher v. Easto*, 1 Dougl. 295, is to the same effect. [CRESSWELL, J.—That a man must be presumed to intend that which is the necessary consequence of his acts, is one of the first principles of both civil and criminal law.] The law supplies the motive. That this deed operated as a conveyance of all Lark's available property, is clear; for, it left him at most only an equitable interest in the surplus, which could not be taken under a *fi. fa.*: *Metcalf v. Scholey*, 2 N. R. 461; *Scott v. Scholey*, 8 East, 467. The necessary and unavoidable consequence of the deed was, to delay his creditors. It falls, therefore, within all the reasons given in the authorities: it prevents the trader from carrying on his business; it delays his creditors; and it holds out a false and delusive credit to the public. Then, it is contended on the

other side, that the present advance of 200*l.* prevents this transaction amounting to an act of bankruptcy. [JERVIS, C. J.—The jury found that that advance was the moving consideration for the execution of the deed.] The execution of the deed was purchased by a *bonâ fide* advance of 200*l.* made a week beforehand. That did not prevent the deed being fraudulent. Upon the execution of the deed on the 8th of April, Larke assigned to the defendant everything he possessed, including the 200*l.* he had received on the 1st, or the goods he might have bought with the money, except wearing apparel and furniture to the extent of 20*l.*, and his book debts, which were proved not to exceed \*99] 20*l.* [CRESSWELL, J.—If Larke had spent \*the 200*l.*, he had it not to trade with: if he had not spent it, it passed by the deed.] Exactly so. [JERVIS, C. J.—The deed was agreed to be executed when the advance was made. I think it should be assumed that it was one transaction.] Assuming that to be the 8th of April, the 200*l.* or its produce passed by the deed. All that is decided in *Baxter v. Pritchard*, and that class of cases, is, that a sale for a present payment of all a trader's stock, is not an act of bankruptcy. There, the man gets value for what he parts with: but where he parts with his goods in satisfaction of a by-gone debt, he does not. To put this case at the highest, the trader sells part of his goods for a money payment, and he assigns all the rest in consideration of a by-gone debt. Is not that an act of bankruptcy? The invalidity of one part of the transaction taints the whole: *Law v. Skinner*, 2 Sir W. Bl. 996. In *Archbold's Bankrupt Law*, 9th edit. p. 55, it is said: "The words of the statute of James are, 'any fraudulent conveyance of his lands, tenements, goods, or chattels.' This has been construed to include all conveyances by a trader of the entire of his property, whether for a past consideration,—as, for instance, to a creditor for a debt already incurred (*Newton v. Chantler*, 7 East, 138, *Wilson v. Day*, 2 Burr. 827, *Hooper v. Smith*, 1 Sir W. Bl. 441, *Siebert v. Spooner*, 1 M. & W. 714†),—or for a present consideration, as, for instance, to indemnify a surety, or to secure a person about to advance money to him (*Worseley v. De Mattos*, 1 Burr. 467, *Butcher v. Easto*, 1 Dougl. 295, *Hassells v. Simpson*, 1 Dougl. 89, n., *Hoffman v. Pitt*, 5 Esp. N. P. C. 22), or without consideration." [WILLIAMS, J., referred to *Smith's Mercantile Law*, 4th edit. p. 530.]

2. The after-acquired property, at all events, could not pass by this deed. It is true, a deed may be so framed as to pass after-acquired \*100] property: *Tapfield v. Hillman*, \*6 M. & G. 245 (E. C. L. R. vol. 46), 6 Scott N. R. 967; *Lunn v. Thornton*, 1 C. B. 379 (E. C. L. R. vol. 50): but the language must be express to that effect: and it seems from the latter case that there must be some ratification, some act done by the assignor, after the property has come to his possession. These goods passed to the assignees, and therefore could not be operated upon by the assignment: *Rouch v. The Great Western*

Railway Company, 1 Q. B. 51 (E. C. L. R. vol. 41), 4 P. & D. 686; Freeman v. Edwards, 2 Exch. 732.† The bankruptcy would be a revocation of the alleged leave and license: Howes v. Ball, 7 B. & C. 481 (E. C. L. R. vol. 14), 1 M. & R. 288.

3. Assuming that the irregularity in the exercise of the power of distress and sale was not urged at the proper season, still, having obtained a verdict, the defendant is entitled to keep it upon any ground that can be suggested, even though it be one not made at the trial at all. [JERVIS, C. J.—Surely not. The plaintiffs may say that by the course you took, they were deprived of the opportunity of tendering a bill of exceptions.] *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:

Three points were raised upon the discussion of this rule. Of these, two were presented plainly in the course of the trial; but the third, although glanced at, was not brought forward and intelligibly stated until after the jury had withdrawn from the court, and been absent for some time considering their verdict. Whether a point so presented ought to be allowed as ground for a new trial, or whether the second point ought to be determined for the plaintiffs or for the defendant, becomes an immaterial inquiry, in the view we take of this case, because we are of opinion that the first point is good, that the assignment of the 8th of April, 1850, was, under the circumstances, an act of bankruptcy, and that \*therefore the rule, which seeks to enter a verdict for the plaintiffs for 315*l.*, ought to be made absolute. [\*102]

The facts necessary to raise this point may be shortly stated. Larke, a trader at Norwich, being indebted to the defendant in the sum of 239*l.* 18*s.*, for goods sold, applied to him, in the month of March, 1850, for the loan of 200*l.*, which the defendant agreed to make, upon condition that Larke should assign over his property to him as a security for the money then due, and for the further advance of 200*l.* Larke assented to these terms; and, the money having been advanced by the defendant on the 1st of April, the deed upon which this question arises was executed on the 8th of April. At the time of this assignment, Larke's stock was worth from 1200*l.* to 1500*l.*; and his book and other debts did not exceed 20*l.* He was indebted to a large amount. At the trial, I held, for the purposes of the day, that the assignment would not be an act of bankruptcy, if the 200*l.* were really advanced, and the deed was executed bonâ fide in consideration of that sum: and, evidence having been adduced by the defendant upon this and other points, I left the question to the jury, who found, that the deed of the 8th of April was executed by Larke bonâ fide, in consideration of the old debt and the further advance, and that the further advance was the moving cause of the deed.

My Brother Byles does not complain of that finding; but, assuming it to be warranted by the evidence, contends that the deed is notwith-

standing an act of bankruptcy. [After stating the material provisions of the deed, the learned judge proceeded as follows :—]

It is remarkable that no decision has been found which bears directly upon the point under discussion. It cannot but be of very common occurrence: and the counsel on either side are therefore well justified in observing that it may be because the point is clear, that no one has hitherto ventured to raise it.

\*102] \*Relying upon the case of *Baxter v. Pritchard*, 1 Ad. & E. 456, 3 N. & M. 638 (E. C. L. R. vol. 28), which establishes that the bonâ fide sale of the whole of a trader's stock, at a fair price, is not an act of bankruptcy even though the trader intended at the time to abscond with the money,—the defendant's counsel contended that this deed was not an act of bankruptcy, because it was founded upon a bonâ fide consideration to be paid for the deed; and they urged that the amount of the consideration was immaterial, provided it was substantial, and the deed was executed, not as a security for a by-gone debt, but, as found by the jury in this case, in consideration of a further advance. They produced no authority bearing directly upon the subject; but they referred to certain expressions which fell from the judges in *Siebert v. Spooner*, 1 M. & W. 714,† and particularly to the language of the late Lord Chief Justice Tindal, in *Lindon v. Sharp*, 6 M. & G. 905 (E. C. L. R. vol. 46), 7 Scott, N. R. 730, to show that a future advance would, under circumstances like the present, be a good consideration for a deed like this.

On the other hand, the counsel for the plaintiffs adverted to the well-known rule of law, that the assignment of the whole of a trader's effects, or the whole with a trifling or colourable exception only, is an act of bankruptcy, and, extracting from the earlier cases the reasons given for this rule, contended that this deed was an act of bankruptcy, because it gave the defendant a preference for his debt,—because it necessarily delayed creditors, even with respect to the balance after the debt had been paid, the trader's equitable interest not being seizable under a *fieri facias*,—and because the goods remaining in the trader's keeping gave him a false credit, whereas, in truth, he had legally no power to continue his trade, or to dispose of a single article of his stock, if the deed were good. With reference to the advance, and the finding of the jury in that respect, they urged, that, if the \*103] \*transaction was to date from the 1st of April, when the advance was made, it was in effect a transfer of all the trader's stock, worth from 1200*l.* to 1500*l.*, for a by-gone debt, except so much as was worth 200*l.*, the sum advanced, and for which alone the trader got an equivalent; and that, considering the value of the stock, and the trader's liabilities, this was a trifling exception, and the deed was, notwithstanding, an act of bankruptcy. And they further said, that, if the transaction was to be viewed from the real date of the deed, viz. the

8th of April, the deed upon its face was an act of bankruptcy; because, if the money advanced to the trader was at that time spent, the transfer was for an old debt; and, if it remained in the trader's keeping, it passed to the defendant by the deed, as did also any property which the trader might thereafter acquire in exchange for the money which he had before received.

The real question is, whether, in the language of the statute 12 & 13 Vict. c. 106, s. 67, this deed is, notwithstanding the finding of the jury, a fraudulent transfer of the goods and chattels of the trader, with intent to defeat or delay his creditors. Every person must be taken to intend that which is the necessary consequence of his own act: and, if a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent. But a deed which has the effect of defeating or delaying a trader's creditors, is, by the policy of the bankrupt law, a fraudulent deed; and therefore a deed which has that effect, is, in the terms of the act, a fraudulent transfer of the trader's goods, with intent to defeat or delay his creditors.

¶ The sale of *the whole* of a trader's stock to a bonâ fide purchaser, for a fair price, has been held not to come within the rule, even though creditors may ultimately be delayed or defeated, and the misapplication of the \*proceeds was contemplated by the trader at the time of the sale,—because the trader gets a present equivalent for his goods, and the sale is strictly in the course of his business: and, of course, the sale of *part* of a trader's stock, for the fair price of that part, cannot be objected to. But the sale of the whole, for the price of a part, not because the trader is obliged, under pressure, to sell his stock for less than its value, but because an old debt is taken as part of the price, though it may not be the moving cause of the transfer, admits of a different consideration, and might be held to be an act of bankruptcy, without conflicting with former decisions. It comes within all the mischiefs referred to by the counsel for the plaintiffs, as deduced from the older cases. The trader gets no present equivalent for his stock; and the transfer, having the effect of defeating and delaying his creditors, would be a fraudulent transfer with intent to effect that object.

But, in this particular case, the form of the deed makes it unnecessary further to consider the general question. It recites that the transfer was made, not only for the further advance, but also for the old debt; and it passes, not only all the trader's stock, and the money advanced, if he then had it in his possession, but it also professes to give to the defendant a right to take all future-acquired property, even though it should be purchased with the money which is alleged to be the consideration for the transfer. The trader, therefore, gets no equivalent for any part of the stock transferred; and such a transfer

necessarily defeats and delays his creditors, and is an act of bankruptcy, without fraud in fact.

In this latter view of the case, it would be unnecessary to examine the cases of *Siebert v. Spooner* and *Lindon v. Sharp*; but it may be convenient to consider to what extent they may be relied upon as supporting the general argument of the defendant's counsel.

\*105] \*We find nothing in *Siebert v. Spooner* which can assist the defendant. The judges there speak of a conveyance being good where an equivalent is given; but they mean, and Baron Alderson says that he means, to speak of a sale or transfer for full consideration. In *Lindon v. Sharp*, the only point was, whether the transfer of all a trader's property for a by-gone debt was an act of bankruptcy, the deed containing no stipulation for further advances, although the trader might reasonably expect that such advances would be made. What would have been the opinion of the court if there had been such a stipulation, does not appear: but the Lord Chief Justice is reported to have said, "that, if it had been the case of a conveyance upon a *bonâ fide* purchase by the defendant, the transaction would have been protected, on the principle laid down in *Baxter v. Pritchard* and some other cases referred to; or, if it had been an assignment by way of security to the bank for advances thereafter to be made, the observation of Lord Kenyon in *Whitwell v. Thompson* would have applied strongly in favour of the defendant." What thus fell from the Lord Chief Justice is carefully expressed. He adopts *Baxter v. Pritchard*, and says that a *bonâ fide* sale would be protected,—he merely says that Lord Kenyon's observations would strongly apply where the assignment is by way of security for future advances. Lord Kenyon said, in *Whitwell v. Thompson*, that it never could be taken to be law, that a trader could not sell his property, when his affairs became embarrassed, or assign them to a person who should assist him in his difficulties, as a security for any advance such person might make to him. *Baxter v. Pritchard* fully bears out the first branch of this proposition; but the second, if put forward as an abstract proposition that a trader may assign the whole of his property for future advances, would

\*106] require further consideration before we \*could adopt it to the full extent. But, upon reference to the case of *Whitwell v. Thompson*, it will be found that Lord Kenyon did not intend to lay down any such proposition. That was an action of trover, to recover two leases which had been deposited by two traders in partnership, *bonâ fide*, with the defendant, as a security for the due payment of two bills accepted by the defendant for their accommodation. It turned out, upon inquiry, that, before the deposit, one of the traders had committed an act of bankruptcy, and that the other trader committed an act of bankruptcy some time after the deposit had been made; and it then became a question how far the deposit of the leases was affected

by the acts of bankruptcy so proved. The leases were not the whole, nor, from anything that appears, a material part, of the trader's property. It was with reference to the question so raised, that Lord Kenyon used the expressions to which allusion has been made: and, as it was not even suggested that the deposit of the leases amounted to an act of bankruptcy, that learned judge could not have intended his observations to apply to a state of things not in any way under discussion before him.

But it is unnecessary to pursue this subject further: the deed here is not for future advances, but for a present payment and a by-gone debt: it conveys all the trader's property, including the advance, and any property purchased with the advance: it necessarily defeats and delays creditors, and is therefore an act of bankruptcy.

For these reasons, we are of opinion that the rule to enter the verdict must be made absolute.

Rule absolute.(a)

(a) See *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72). There, Y., a trader, being indebted to L. in 200*l.*, agreed with the defendant, that, on the defendant's paying the 200*l.* to L., Y. would assign by bill of sale all her effects to a defendant, to secure the 200*l.* A deed of assignment was executed some months after: it contained a power for the defendant [\*107 to enter, and take all the effects which might be on the premises at the time of such entry, and sell them, and, out of the price, to repay himself the 200*l.*, and pay expenses of sale, and pay the residue to Y. Y. covenanted to pay the 200*l.* by instalments, and was to remain in possession till default in payment. Afterwards, Y., who had remained in possession, sold the effects for 567*l.*, and, out of that sum, paid the 200*l.* to the defendant. Y. having afterwards become bankrupt, her assignees sued the defendant to recover the 200*l.*, and relied on the execution of the deed as an act of bankruptcy, and fraudulent against creditors. The jury having found that the deed was not executed with intent to defeat or delay creditors, and the payment not made in contemplation of bankruptcy, and a verdict having thereupon been directed for the defendant,—a rule for a new trial was refused, the execution of the deed not being necessarily in itself an act of bankruptcy; for, the transaction was as if the deed had been executed at the time of the payment by the defendant to L., which constituted a good consideration between Y. and the defendant; and the clause enabling the defendant to sell after-acquired property, did not vitiate the transaction.

In delivering the judgment of the court, Lord Campbell said: "Reliance is chiefly placed by my Brother Kinglake upon a clause in this deed, which authorizes the defendant to enter and sell after-acquired property; and he refers us to *Graham v. Chapman* as an authority to prove that a deed with such a clause is necessarily an act of bankruptcy. On referring to the case, we do not find any such doctrine laid down in it. There, the deed expressly recited that it was given, not only for a further advance, but for an old unsecured debt; and Lord Chief Justice Jervis several times over points this out as the chief foundation of his judgment. He likewise remarks upon the power to take after-acquired property, which there might have prevented the trader from deriving any benefit whatever from the further advance. But that cannot apply to a case like the present, where the trader did derive the full benefit of the whole sum advanced, by its being applied at the time to satisfy the demand of an importunate creditor."

And see *Smith v. Cannan*, 2 Ellis & B. 35 (E. C. L. R. vol. 75), where Parke, B., says: "The test is, not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader."



**\*108] \*ADDISON v. The Mayor, Aldermen, and Burgesses of the Borough of PRESTON. April 21.**

The 92d section of the municipal reform act, 5 & 6 W. 4, c. 76, enacts, that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, &c., of all moneys, dues, chattels, and securities belonging to the corporation, shall be paid to the treasurer, and shall be carried by him to the account of a fund called "The Borough Fund," and such fund shall (subject to certain charges thereon) be applied towards the payment of the salaries of the mayor, recorder, &c., and of any other officer whom the council shall appoint:—Held, that the judge and assessor of the borough court of record for the trial of civil actions, appointed by the council at a certain salary, could not maintain an action of debt against the corporation, for arrears of such salary.

THIS was an action of debt. The declaration stated that the defendants, before the commencement of the action, to wit, on the 1st of January, 1851, were indebted to the plaintiff in the sum of 52*l.* 10*s.*, payable upon request, for the service and attendance of the plaintiff by him done, performed, and bestowed for a long time, to wit, for one year before then elapsed, in and about the holding before the plaintiff of a certain court of record for the trial of civil actions, to wit, the court of pleas for the borough of Preston,—being a court which by charter or custom was and ought to be, during all the time aforesaid, holden in the said borough,—and as the necessary officer (other than the recorder), to wit, the judge and assessor before whom the said court was to be, and was, during all the time aforesaid, holden, he the plaintiff having been during all the time aforesaid such officer, judge, and assessor, upon and by the appointment of the council of the said borough; such appointment being made according to the provisions of a statute made in the session of parliament holden in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled, &c.:(a) and for the salary therefore due and of right payable by the defendants to the plaintiff, &c.

Plea,—never indebted.

**\*109]** By consent of the parties, and by order of Cresswell, \*J., the following case was stated for the opinion of the court,—the parties agreeing that judgment should be entered for the plaintiff or defendants, by confession or nolle prosequi immediately after the decision of the case, or otherwise, as the court might think fit,—according to the statute 3 & 4 W. 4, c. 42, s. 25:—

Preston is one of the boroughs contained in schedule A. to the municipal corporation reform act, 5 & 6 W. 4, c. 76, an act for the regulation of municipal corporations in England and Wales. It is directed by that schedule to have six wards, twelve aldermen, and thirty-six councillors.

Up to the respective times of that act passing and taking effect, Preston had a common council, consisting of a mayor, seven other alder-

men, and seventeen capital burgesses. The aldermen, as well as the capital burgesses, were elected by the common council, for life. The mayor was elected annually by a jury chosen by two electors, one of whom was nominated by the outgoing mayor and one by the other aldermen. The mayor, recorder, and aldermen were by charter justices of the peace for the borough; and a separate court of quarter sessions of the peace was, before and at the passing of the said act, holden in and for the said borough. The mayor and the two senior aldermen were coroners for the borough. The recorder was elected by the common council. There was in the borough, by charter, a court of record for the trial of civil actions, called the court of pleas for the said borough, holden on Friday in every third week, and not regulated by the provisions of any local act of parliament. Of this court, the mayor and any two or more of the aldermen, were by charter the judges.

The plaintiff was elected recorder in the year 1882, and has ever since held that office, except so far as it has been or is affected by the municipal corporation reform act above mentioned. He was [\*110 then, and ever since has been, a barrister of more than five years' standing. Notwithstanding the change made by the municipal corporation reform act, he has continued to be popularly styled recorder. He never had any deputy-recorder.

From the time of the plaintiff's election as recorder, until and at the time of the said municipal corporation reform act coming into operation, the plaintiff acted as assessor of and in the said court of pleas: but the court was always held before the judges designated by the charter: and no formal appointment of the plaintiff to the office of assessor was ever made.

It is by the municipal corporation reform act, 5 & 6 W. 4, c. 76, enacted as follows:—Section 1, "that so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters-patent, now in force relating to the several boroughs named in the schedules A. and B. to this act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act, shall be and the same are hereby repealed and annulled."

Section 6. "That after the first election of councillors under this act in any borough, the body or reputed body corporate named in the said schedules in connexion with such borough, shall take and bear the name of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and their successors respectively may do and suffer by any name or title of incorporation; and the mayor of each of the said boroughs shall be capable in law to do and suffer all

\*111] acts which the chief officer of \*such borough may now lawfully do and suffer, so far as the same respectively are not altered or annulled by the provisions of this act."

Section 92. "That, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules A. and B., or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings either at law or in equity which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, *shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police-magistrate hereinafter mentioned, when there is a recorder or police-magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint; and also towards the pay-*

\*112] *ment of the expenses incurred from time to time in \*preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction and corporate buildings, and towards the payment of the constables, and of all other expenses, not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act; and, in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough; and, in case the borough fund shall not be sufficient for the purpose aforesaid, the council of the borough is hereby authorized and required, from time to time, to esti-*

mate as correctly as may be what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and in order to raise the amount so estimated, the said council is hereby authorized and required from time to time to order a borough-rate, in the nature of a county-rate, to be made within their borough."

Section 94. "That it shall not be lawful for the council of any body corporate to be elected under this act, to sell, mortgage, or alienate the lands, tenements, or hereditaments of the said body corporate, or any part thereof, except in pursuance of some covenant, contract, or agreement bonâ fide made or entered into on or before the 5th of June in the present year, by or on behalf of the body corporate of any borough, or of some \*resolution duly entered on the corporation books of [ \*113 such body corporate on or before the said 5th of June, or to demise or lease, except in pursuance of some covenant, contract, or agreement bonâ fide made or entered into on or before the said 5th of June, by or on the behalf of such body corporate, or in pursuance of some resolution duly entered in the corporation books of such body corporate on or before the said 5th of June, or, except in the cases hereinafter mentioned, any lands, tenements, or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements, or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or, if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and, in every lease which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned) be reserved and made payable, during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same: Provided, nevertheless, that, in every case in which such council shall deem it expedient to sell and alienate, or to demise and lease for a longer term than thirty-one years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements, or hereditaments, it shall be lawful for such council to represent the circumstances of the case to the lords commissioners of his Majesty's treasury; and it shall be lawful for such council, with the approbation of the said lords commissioners, or any three of them, to sell, alienate, and demise any of the lands, tenements, and hereditaments of the said body \*cor- [ \*114 porate, in such manner and on such terms and conditions as shall have been approved by the said lords commissioners: Provided always, that notice of the intention of the council to make such application as aforesaid shall be fixed on the outer door of the Town Hall, or on some public and conspicuous place within the borough, one calendar month

at least before such application; and a copy of the memorial intended to be sent to the said lords commissioners shall be kept in the town-clerk's office during such calendar month, and shall be freely open to the inspection of every burgess, at all reasonable hours during the same."

Section 103. "That the council of any borough which shall be desirous that a separate court of quarter sessions of the peace shall be or continue to be holden in and for such borough, shall signify the same by petition to his Majesty in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay to the recorder in that behalf; and it shall be lawful for his Majesty, if he shall be pleased thereupon to grant that a separate court of quarter sessions of the peace shall be thenceforward holden in and for such borough, to appoint for such borough, or for any two or more of such boroughs conjointly, a fit person, being a barrister-at-law of not less than five years' standing, who shall be and be called the recorder of such borough or boroughs, and shall hold such office during his good behaviour, and, upon any vacancy in any such office, to appoint another fit person, being a barrister-at-law of not less than five years' standing, to be the recorder in the place of the person so making such vacancy: Provided, that, in every borough in and for which a separate court of general or quarter sessions of the peace is now holden, and of which the present recorder or deputy-recorder is a barrister of five years' \*115] standing, such recorder or deputy-recorder, being \*qualified as aforesaid, shall be continued or appointed recorder under the provisions of this act."

Section 107. "That, after the 1st of May, 1836, all powers and jurisdictions to try treasons, capital felonies, and all other criminal jurisdictions whatsoever granted or confirmed by any law, statute, letters-patent, grant, or charter whatsoever, to any mayor, bailiff, alderman, recorder, or other corporate or chartered officer, or corporate or chartered justice of the peace whomsoever in any borough, and all right of any body corporate in any borough, or any of the members thereof, by virtue of any law, statute, letters-patent, grant, or charter whatsoever, to elect or nominate any justices to keep the peace in or for any borough, or by any members of any such corporate body, to act as such justice of the peace in and for any of the last-mentioned boroughs, other than is herein declared, shall cease."

Section 118. "That, in every borough in which by charter or custom there is or ought to be holden a court of record for the trial of civil actions, not regulated by the provisions of any local act of parliament, or in which, at the time of the passing of this act, a barrister of five years' standing shall not act as judge or assessor, the recorder, or, in the absence of the recorder, or, in case there shall not be a recorder, such officer of the borough as by the charter constituting such

court, or by custom, shall be the judge of such court, shall continue to be and act as such judge; and the council of such borough, in every case, whether such court be regulated by the provisions of a local act of parliament or otherwise, shall have power for that purpose to appoint the necessary officer, other than the recorder, before whom such court is to be holden; and every such judge or assessor other than the mayor shall hold his office during his good behaviour; and the judge of every such court shall hold the said court at such times and places, and with such \*rules of practice, and with the same powers and jurisdiction as belonged to the said court at the time of passing this [\*116 act: Provided always, that, in every case in which such court had not, before the passing of this act, authority to try such actions as are hereinafter next mentioned, any such court in which a barrister of five years' standing shall act as judge or assessor, shall have authority to try actions of assumpsit, covenant, and debt, whether the debt be by specialty or on simple contract, and all actions of trespass or trover for taking goods and chattels, provided the sum or damages sought to be recovered shall not exceed 20*l.*, and all actions of ejectment between landlord and tenant wherein the annual rent of the premises of which possession is sought to be recovered shall not exceed 20*l.*, and upon which no fine shall have been reserved or made payable."

Section 119. "That the council of every borough in which there shall be holden a court of record for the trial of civil actions as aforesaid, shall appoint a registrar of such court, except in boroughs where the town-clerk acts as such registrar, and such officers and servants as are necessary for carrying on the business and executing the process of such court: Provided that no registrar or other officer of such court shall, by himself or any partner, or by his or their clerks, practise as an attorney in such court, nor shall any such partner or clerk act as agent for any other attorney in such court: Provided also, that, unless disqualified as herein provided, every attorney of his Majesty's superior courts at Westminster shall have full liberty to practise as an attorney in every such court."

Section 120. "That no suit commenced in any court of record in any borough before the 1st of May, 1836, shall abate by reason of any change that shall have been made in the constitution of such court by the provisions of this act; but that the same may continue, and be \*heard and determined as if it had been commenced before such [\*117 judge."

By the 6 & 7 W. 4, c. 105, which received the Royal assent on the 20th of August, 1836, it is enacted, by s. 9,—after reciting that doubts have arisen as to the provisions of the act for regulating corporations, respecting judges in borough courts of record for the trial of civil actions not regulated by the provisions of any local act of parliament, or in which at the time of passing the said act a barrister of five years'

at least before such application; and a copy of the memorial intended to be sent to the said lords commissioners shall be kept in the town-clerk's office during such calendar month, and shall be freely open to the inspection of every burgess, at all reasonable hours during the same."

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court, or by custom, shall be the judge of such court, shall continue to be and act as such judge; and the council of such borough, in every case, whether such court be regulated by the provisions of a local act of parliament or otherwise, shall have power for that purpose to appoint the necessary officer, other than the recorder, before whom such court is to be holden; and every such judge or assessor other than the mayor shall hold his office during his good behaviour; and the judge of every such court shall hold the said court at such times and places, and with such \*rules of practice, and with the same powers and jurisdiction as belonged to the said court at the time of passing this [\*116 act: Provided always, that, in every case in which such court had not, before the passing of this act, authority to try such actions as are hereinafter next mentioned, any such court in which a barrister of five years' standing shall act as judge or assessor, shall have authority to try actions of assumpsit, covenant, and debt, whether the debt be by specialty or on simple contract, and all actions of trespass or trover for taking goods and chattels, provided the sum or damages sought to be recovered shall not exceed 20*l.*, and all actions of ejectment between landlord and tenant wherein the annual rent of the premises of which possession is sought to be recovered shall not exceed 20*l.*, and upon which no fine shall have been reserved or made payable."

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standing did not act as judge or assessor,—“that the recorder, and, in the absence of the recorder, such person, being a barrister of not less than five years’ standing, as shall be appointed by the recorder under his hand and seal to hold the said court, shall be the judge of such court, and shall hold the said court at such times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct: and every recorder or person so appointed to hold such court shall be entitled to have such salary paid to him out of the borough-fund as the council shall fix by some by-law to be made in that behalf: Provided also that all rules hereafter to be made for regulating the practice of such court, shall be approved and signed by the recorder of such borough, if there shall be a recorder, before the same shall be submitted to the judges of the superior courts for allowance and confirmation by them according to the provisions of the said recited act.”

Upon the municipal corporation reform act coming into operation, the old common council went out of office, and their powers and duties ceased, as directed by s. 38 of that act. They were succeeded by a common council elected under the provisions of that act, having the tenure of office and exercising the functions thereby prescribed. But the justices of the peace for the borough, including the plaintiff, who was a justice of peace as recorder, continued to have and exercise their \*118] powers as \*justices of the peace until the 1st of May, 1836, but no longer, as directed by s. 38.

In pursuance of the said act, and of his late Majesty’s order in council appointing days as authorized by the said act (s. 148), the members of the new council held their first meeting on Thursday, the 31st of December, 1835, which meeting was only for the election of aldermen. On Friday, the 1st of January, 1836, by the like authority, the members of the council met again, and elected a mayor, who took upon himself the office. The council, being thus fully constituted, passed on the same day the following resolution:—

“This council doth appoint T. B. Addison, Esq., now recorder of this borough, being a barrister of more than five years’ standing, to be the judge and assessor before whom the court of pleas for this borough shall be holden, to hold the said office during his good behaviour. And this council directs that the said court shall continue to be held on Friday in every third week, as hath been accustomed, except so far as the practice of the same court is or shall be lawfully varied or altered; and that, in the absence of the recorder, and when there is no recorder, the said court shall be holden by and before the mayor and two or more of the aldermen of this borough, according to the old charter.”

The same council also passed resolutions appointing a registrar and sergeants-at-mace and executive officers of the said court.

These resolutions are entered in the minute-book of the council, and signed by the mayor.

The said court has ever since been regularly holden, and the plaintiff has performed the duties of judge and assessor in and of the same, presiding therein whenever issues at law or in fact have been to be tried, or other business has arisen requiring a presiding officer, and has always been of good behaviour in the said office. He \*has [\*119 always since the above appointment acted as the judge of the court. The issues tried before him have comprised not only such as had been joined in causes there pending, but also such as were sent from the superior courts by writ of trial under the 3 & 4 W. 4, c. 42, s. 17. Many such writs have been issued: they have been directed "to the judge and assessor of the court of pleas for the borough of Preston." The trials thereupon have taken place in the said court before the now plaintiff, and he has returned the writs of trial in his own name.

Nothing was done respecting the salary of the plaintiff till the 1st of January, 1838, when, at a quarterly meeting, the following resolutions were passed:—

"On motion of Mr. Alderman Haydock, seconded by Mr. Councillor Hopkins, it was unanimously agreed and ordered, that the salary of the judge and assessor of the court of pleas for this borough be fixed at the yearly sum of 50 guineas, to commence from the 1st of January, 1836, the date of his appointment: And it is further agreed and ordered, that such salary for the two last years, amounting to 105*l.*, be forthwith paid; for which payment, the extract of this order, signed by three or more members of the council, and countersigned by the town-clerk, shall be the treasurer's warrant."

The above resolutions were entered in the minute-book of the council's proceedings; and signed by the mayor.

The said sum of 105*l.* was accordingly paid to the now plaintiff, and allowed in the treasurer's accounts.

The same salary, at the rate of 52*l.* 10*s.* per annum, has been paid to the plaintiff by half-yearly portions up to and including that for the year 1849. Such payments have been made by the treasurer in obedience to successive orders of the council, entered in the minute-books of their proceedings, and signed by the mayor for the time being, extracts of which orders were signed by \*three members of the council, and countersigned by the town-clerk, according to the [\*120 directions of the 5 & 6 W. 4, c. 76, s. 69. The said payments have been included in the successive annual statements of all moneys received and expended on account of the mayor, aldermen, and burgesses of the said borough for the respective years in which they were made; which statements have been approved by the council, signed by the mayor, and transmitted to one of her Majesty's principal secretaries of state, as directed by statutes 6 & 7 W. 4, c. 104, s. 10, and 1 Vict. c. 78, s. 23.

Imprisonment for debt not exceeding 20*l.* was abolished by the 7 & 8 Vict. c. 96, s. 57; which act provides compensation for officers of courts whose emoluments were thereby diminished,—s. 70. The sergeants-at-mace, or executive officers of the said court of pleas, claimed compensation for such diminution of their emoluments; which claim was allowed, and compensation granted by the commissioners of the treasury.

At a special meeting of the council, held on the 1st of January, 1850, an order was made for payment of salaries “due from this corporation,” including 26*l.* 5*s.*, half a year’s salary, to the now plaintiff.

The number of causes coming to be tried in the said court, and the consequent amount of attendance required from the now plaintiff thereat, having considerably decreased in consequence of the operation of the said statute of 7 & 8 Vict. c. 96, s. 57, and consequently by the operation of the new county-courts act, 9 & 10 Vict. c. 95, the council at the same meeting passed the following resolution:—“Resolved, that the salary of 52*l.* 10*s.* now paid to the judge of the court of pleas, be altered to 10 guineas, in pursuance of the recommendation of the committee appointed to inquire into the duties, salaries, and emoluments of corporate officers.”

\*121] This meeting was duly convened and held for the \*special purposes mentioned in the said resolution; and the resolution was entered in the minute-book of the council’s proceedings, and signed by the mayor.

The plaintiff having refused to accept the reduced salary of 10 guineas, no sum has been paid to him in respect of the said salary for the year commencing with the 1st of January, 1850; and this action is brought for the recovery of the said salary, which the plaintiff claims after the rate specified in the resolution of the 1st of January, 1838, viz. fifty guineas a year; the plaintiff insisting, that the council have no power to reduce the salary of an office which he holds during his good behaviour, and that the resolution of the 1st of January, 1850, is illegal and void, or, if in any respect operative, does not affect the plaintiff’s title to recover in this action.

The defendants, on the other hand, contend that the council in 1836 and 1838, and again on the 1st of January, 1850, acted under a misconception of their powers, and that the appointment of the plaintiff to the office of judge, the resolution directing a salary to be paid to him in this capacity, and the resolution reducing the amount of the salary, or appointing a substituted salary, were all illegal and void. The defendants also contend, that, on the assumption that the council in 1838 had power to appoint a salary to the plaintiff, the council in 1850 had power to reduce its amount from 50 to 10 guineas per annum, and that it was so reduced by the resolution of the 1st of January, 1850.

The defendants also contend, that, in any event, this action cannot be maintained.

The question for the opinion of the court, is,—whether, upon the pleadings and facts above stated, the plaintiff is entitled to recover in this action a year's salary after the rate of 50 guineas per annum, or after the rate of 10 guineas per annum, or any and what other sum.

\*If the court should be of opinion that the plaintiff was entitled so to recover, then judgment was to be entered for the plaintiff, [\*122 and for such amount of debt as the court should think him entitled so to recover, with 1s. damages, and full costs of suit. If the court should be of opinion, that, upon the pleadings and facts above stated, the defendants were entitled to a verdict and judgment in this action, then judgment was to be entered for the defendants, with costs. If the court should be of opinion, that upon the pleadings and facts above stated, the plaintiff is entitled to a verdict, but that the defendants were entitled to succeed in a motion to arrest the judgment, then judgment was to be arrested, and all further proceedings in this action were to be stayed: or judgment was to be entered and the cause disposed of otherwise as the court should think fit.

*John Henderson* (with whom was *G. Denman*), for the plaintiff.(a)—The circumstances disclosed in the special \*case show an unquestionable right in the plaintiff to maintain this action, upon the [\*123 principle laid down by Lord Holt, in *Anonymous*, 6 Mod. 27, where he says: “If money be devised out of land, sure the devisee may have debt against the owner of the land for the money, upon the statute of 32 H. 8, c. 1, of wills; for, wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him, contrary to law, by the same statute; for, it would be a fine thing to make a law by which one has a right, but no remedy except in equity.” And that was acted upon by the Court of Exchequer in *Hopkins v. The Mayor, &c., of Swansea*, 4 M. & W. 621.† In that case, the declaration, in debt against the corporation of Swansea, stated,

(a) The points marked for argument on the part of the plaintiff, were,—

1. “Whether, under the municipal corporation reform act, 5 & 6 W. 4, c. 76, s. 118, the plaintiff held for the year 1850, during his good behaviour, the office mentioned in the case by the description of judge or assessor of the court of pleas for the borough of Preston (the said court being a court of record for the trial of civil actions, not regulated by the provisions of any local act of parliament), either by reason of the plaintiff's having acted as assessor in the said court at the time of the passing of the said act, he being then a barrister of five years' standing, or by reason of the plaintiff's appointment to such office by the council of the said borough on the 1st of January, 1836.
2. “Whether the said council had power, by virtue of their order of the 1st of January, 1838, to assign to the plaintiff a salary of 50 guineas per annum for the said office.
3. “Whether the said council had power, by their order of the 1st of January, 1850, to reduce the said salary to the sum of 10 guineas per annum.
4. “Whether this action is maintainable, to recover a salary for the said office, in respect of the year 1850, after the rate of 50 guineas per annum, or of 10 guineas per annum, or after any and what rate.”

that, in the year 1762, an act of parliament passed for dividing and enclosing two pieces of open land in the borough, over which the corporation had immemorially exercised the sole right of pasturage, and enacted that they should be divided between and allotted to the lord of the manor and the corporation in certain shares, and that the corporation should have power from time to time to make leases of the allotments so vested in them, for such terms and with such covenants and agreements as the burgesses in common-hall assembled should think proper. The declaration then set out a "rule, order, and ordinance" of the burgesses in common-hall assembled, made on the 1st of April, 1762, whereby, after reciting that they were of opinion that the most beneficial mode for the corporation of enclosing the lands, would be, to grant leases of them for long terms to such burgesses as were willing \*124] to take the same, under covenants to enclose them, it was \*ordained that no lease should be made to one burgess, in the same lease, of more than fifty acres or less than five: and, "it being their desire and opinion that every burgess residing within the borough should receive a benefit from the said enclosure," it was further ordered that certain annual sums out of the rents arising from the enclosure should be paid and distributed yearly by the common attorneys of the borough for the time being, on every 2d of November, among the twelve senior burgesses residing within the borough; and that no burgess who should take a lease should be entitled to receive any of such money. The declaration then stated the granting of the leases; that the plaintiff, after the passing of the municipal corporation reform act, 5 & 6 W. 4, c. 76, viz. for a year ending on the 2d of November, 1836, was one of the twelve senior burgesses; and that the defendants had received from the rents of the land sufficient to satisfy the sums so ordered to be paid; and that the office of common attorney was abolished by that statute. The Court of Exchequer held, that the declaration was good,—that the ordinance of 1762 was a valid by-law,—that an action of debt was maintainable on it, at common law, by parties to whom pecuniary benefits were given by it,—and that, under the 5 & 6 W. 4, c. 76, s. 2, such an action was maintainable against the corporation at large. And that decision was affirmed on error,—8 M. & W. 901,†—the court of error saying, that, "although they doubted whether any action could have been maintained at common law upon the by-law alone, they were of opinion, that, by virtue of the provisions of the statute 5 & 6 W. 4, c. 76, s. 2, the plaintiff had a right enforceable by an action of debt against the corporation, for the benefit he enjoyed before the statute, under the by-law, upon the principle laid down by Lord Holt in 6 Mod. 27." [CRESSWELL, J.—That was not a charge upon the \*125] general fund of the corporation, but \*upon the income derived from specific lands.] This case is in no degree affected by the decision of this court in *Bogg v. Pearse*, 10 C. B. 534 (E. C. L. R. vol. 70),

2 L. M. & P. 21, where the court refused to infer a liability on the part of commissioners under a local paving-act, to pay the salary of a beadle or street-keeper, from a mere naked authority to appoint such an officer. There was nothing on the face of that act to create the resulting duty to pay. Here, however, the statute distinctly recognises the right of the plaintiff to be paid out of the money of the corporation: and, if the act of parliament contemplates a pecuniary benefit to the plaintiff, the law, upon the principle before adverted to, infers the power and the right to enforce it. The liability of a corporation on a judgment, is a very different thing from the liability of commissioners under a local act. It will be said, on the other side, that the plaintiff was not duly appointed to the office in respect of which he claims to receive salary. He was, however, *de facto* appointed, and he acted as assessor or judge for sixteen years. The case, therefore, falls within the doctrine of *The Queen v. Grimshaw*, 10 Q. B. 747 (E. C. L. R. vol. 59), where it was doubted whether a coroner in a borough, under the 5 & 6 W. 4, c. 76, could regularly (by s. 62) be appointed before a grant of a quarter session has passed the great seal, though within ten days after her Majesty's pleasure has been certified to the council: but, a coroner having acted under such appointment, and been recognised in his office by the council for several years, it was held that the office was full, and that an information in the nature of a *quo warranto* lay to oust a subsequently-appointed coroner. [JERVIS, C. J.—No doubt, a *de facto* appointment is sufficient, so far as concerns the exercise of the office.] That being so, it is needless to inquire into the plaintiff's original appointment. [JERVIS, C. J.—The plaintiff is said to be judge of a civil court: is there any such office under the \*municipal corporation act?] The office in question comes [\*126 within the first part of the 118th section, which enacts, "that, in every borough in which, by charter or custom, there is or ought to be holden a court of record for the trial of civil actions, not regulated by the provisions of any local act of parliament,"—which is the case here,—“or in which, at the time of the passing of this act, a barrister of five years' standing shall not act as judge or assessor,”—which is not this case,—“the recorder,”—that is, the *new* recorder under the act,—“or, in the absence of the recorder, or in case there shall not be a recorder, such officer of the borough as by the charter constituting such court, or by custom, shall be the judge of such court, shall continue to be and act as such judge; and the council of such borough, in every case, whether such court be so regulated by the provisions of a local act of parliament or otherwise, shall have power for that purpose to appoint the necessary officer, other than the recorder, before whom such court is to be holden; and every such judge or assessor, other than the mayor, shall hold his office during his good behaviour,” &c. The case states that there was in this borough, by charter, a court of

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record for the trial of civil actions, called "the court of pleas," not regulated by the provisions of any local act of parliament, of which court the mayor and any two or more of the aldermen were by charter the judges. The 118th section was not intended to apply except to the case of a single judge. In that case, the "necessary officer" must be appointed before the court can be held. Doubts having arisen upon that section, the 9th section of the 6 & 7 W. 4, c. 105, enacted and declared, that from and after the passing of that act, "the recorder [or his deputy] shall be the judge of such court;" and "every recorder, or person so appointed to hold such court, shall be entitled to have \*127] such salary paid to him out of the borough-fund, \*as the council shall fix by some by-law to be made in that behalf." That clause is inapplicable, unless it means the recorder de facto. If the plaintiff was so, he clearly would be entitled to the salary fixed. The 58th section of the 5 & 6 W. 4, c. 76, authorizes the council to appoint the treasurer: and the 92d defines his duties, one of which is, to apply the "borough-fund" towards the payment of "the salary of the mayor and of the recorder, and of the police-magistrate thereafter mentioned, when there is a recorder or police-magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint," &c. [JERVIS, C. J.—Could the mayor, as mayor, sue?] There might be a difficulty in that case: but the 92d section recognises the general obligation of the corporation to pay. [JERVIS, C. J.—And points out the fund out of which they are to pay.] The payment is to be made out of the funds of the corporation, but by the hand of the recorder. [JERVIS, C. J.—Suppose there are no funds?] The action will be profitless unless there is property to levy on. The statute recognises the right of the corporation to receive, and the duty to pay: if so, it gives a cause of action. [WILLIAMS, J.—In *Hopkins v. The Mayor, &c.*, of Swansea, there was an allegation that there was money enough in hand to pay the demand.] Such an allegation was essential there, because the money was only payable when there was a surplus.

The next question,—and one of great importance,—is, whether the council had power to reduce the plaintiff's salary. Seeing that he might have to try causes between members of the council themselves, many reasons would suggest themselves why the council should not have this sort of control. [JERVIS, C. J.—This point does not arise, unless the court is with you upon the other. The principle which it involves,—whether the salary of an officer appointed during good behav-  
\*128] iour, \*can be altered,—was very much considered by the treasury, in the case of the county constabulary. I do not remember whether any application on the subject was made to the Court of Queen's Bench.] Suppose this were the ordinary case of master and

servant: the terms could only be altered by putting an end to the contract itself.

he second count is for work and labour. It has been held in many cases, that corporations are liable in respect of executed contracts. [CRESSWELL, J.—For the purpose of that count, you must prove a contract, and that you cannot do. The contract, if any, was, to serve the public, not the corporation.]

*Byles*, Serjt. (with whom was *Segar*), *contra*. (a)—The \*plaintiff [\*129 was appointed to a gratuitous office, and acted gratuitously for two years, viz. in 1836 and 1837. On the 1st of January, 1838, the council passed a resolution fixing the recorder's salary at 50 guineas per annum, to commence from the date of his appointment, the 1st of January, 1836. To entitle the plaintiff to claim that sum from the present defendants, there must either be a contract, or some statutable liability cast upon the defendants. Contract, it is conceded, there is none. Does, then, the statute make it incumbent on the corporation to pay? The plaintiff is not the servant of the corporation; he is an officer of the crown: the relation between him and the corporation somewhat resembles that of patron and presentee. The statute, by s. 92, provides a fund out of which the plaintiff would be entitled to payment, assuming he was duly appointed. That section and the 9th section of the 6 & 7 W. 4, c. 105, show that the borough-fund is the fund out of which payment may be enforced, the proper steps being taken for that purpose. The 94th section of the 5 & 6 W. 4, c. 76, shows how jealously the legislature has thought fit to guard against the real property of the corporation being charged. There is no allegation here that there is any borough-fund out of which the money sought to be recovered could be paid. If a judgment were obtained against the corporation, the result might be extremely inconvenient: it might be

(a) The points marked for argument on the part of the defendants, were,—

1. "That, assuming plaintiff entitled to be paid the salary of 50 guineas, or the reduced salary of 10 guineas, he cannot recover in this action, which is upon an alleged executed contract; because,—first, the appointment to a judicial office, and of a salary to be paid to the officer, does not constitute a contract for work and labour between the patron and the officer,—secondly, by the 92d section of the 5 & 6 W. 4, c. 76, the borough-fund is charged with the payment of the salaries of every officer whom the council shall appoint; and, by the 94th section, the council is restrained from mortgaging or alienating the lands, tenements, or hereditaments of the body corporate, except as therein mentioned, but a judgment against the corporation would amount to a mortgage or alienation,—thirdly, that the salary sought to be recovered is an annual salary, and, by the 92d section, is charged upon the annual revenue of the corporation, but a judgment in this action would charge the corpus of the corporate estate.

2. "That the plaintiff was not duly appointed, and never held the office of assessor or judge; the appointment was under the 118th section of the municipal corporation reform act, which the defendants contend did not authorize the appointment of a judge or assessor, but only where necessary, of the officer who by virtue of his office is by charter or otherwise judge of the court; that the 119th section, in this case, continued the mayor and any two aldermen judges as before the act: neither is the plaintiff appointed under the 6 & 7 Vict. c. 105, s. 9; nor is he recorded within the 93d section of the 3 & 4 W. 4, c. 76.

"3. That there has been no grant of the office or salary under the corporation seal.

"4. That the council had power, and did effectually by the order of the 1st of January, 1850, reduce the plaintiff's salary from 50 guineas per annum to 10 guineas per annum."



that the insignia of office or other personal property of the corporation might be taken under \*a fi. fa. There is no authority in the \*130] statute for that: it clearly could not have been intended. It may be that a mandamus would lie against the corporation to compel them to make a borough-rate; or it may be, as was suggested in *Bogg v. Pearse*, that an action on the case would lie: but clearly not an action of debt. In *Jones v. The Mayor, &c., of Carmarthen*, 8 M. & W. 605,† it was held, that the town-clerk of a borough cannot maintain an action of debt against the corporation, for fees in respect of the performance of the duties imposed upon him by the reform act or the municipal corporation act: although he received no stated salary as town-clerk, and although the then corporation, in several years before the passing of the municipal corporation act, made payments to him for the performance of the duties imposed on him by the reform act. Lord Abinger, in giving judgment,—after disposing of that part of the claim which related to business done in pursuance of the directions of the reform act,—says: “With regard to the other branch of the plaintiff’s demand, for duties performed under the municipal corporations act, his remedy, if any, is founded upon the clauses of that act which have been referred to [ss. 92, 93], and not upon any contract. They are to be paid for, if at all, out of a particular fund,—negating thereby the idea that the corporation are to pay as contractors. The act directs him to do them, and does not direct that he shall be paid, except for his expenses, and that out of the borough-fund. He is not, therefore, entitled to call upon the corporation by way of contract.” The case of *Hopkins v. The Mayor, &c., of Swansea* might have been applicable here, if it had been shown that these defendants had received money which they had neglected to pay over; though, even then it is not admitted that *debt* would have lain. If the plaintiff stands upon his original appointment, he is entitled to nothing: it was an appointment without \*salary. [WILLIAMS, J.—That was because, until \*131] the passing of the 5 & 6 W. 4, c. 76, the council had no power to give a salary.] They clearly had no power to augment it.

A very nice question arises as to whether or not the plaintiff was properly appointed at all. That depends upon the 118th section of the 5 & 6 W. 4, c. 76, modified, as it is said, by the 6 & 7 W. 4, c. 105, s. 9. The latter, however, is a mere declaratory act: it does not profess to introduce anything new. The 118th section enacts, that, in every borough in which by charter or custom there is or ought to be holden a court of record for the trial of civil actions, not regulated by the provisions of any local act of parliament, or in which at the time of the passing of this act a barrister of five years’ standing shall not act as judge or assessor, *the recorder*, or, in the absence of the recorder, or in case there shall not be a recorder, such officer of the borough as by the charter constituting such court, or by custom, shall

be the judge of such court, *shall continue to be and act as* such judge; and the council of such borough, in every case, whether such court be regulated by the provisions of a local act of parliament or otherwise, shall have power for that purpose to appoint *the necessary officer*, other than the recorder, before whom such court is to be holden. [WILLIAMS, J.—That section seems to contemplate the case of a recorder *continuing to act*, which can hardly apply to the *new* recorder.] Whether it means the old or the new recorder, is for this purpose immaterial. The “proper officer” for the council to appoint, would be, the mayor and two aldermen, and not the plaintiff. [JERVIS, C. J.—Suppose the mayor is the only chartered officer?] That, no doubt, would present a case of difficulty. If the 118th section means the new recorder, the judges of this court are already provided by the charter, and the council could not appoint \*Mr. Addison. If it means the old recorder, they have not appointed the proper [\*132 officer.

*Henderson*, in reply.—It is true there is no formal contract in this case: but, if there is a statutory duty imposed upon the corporation to pay, an action of debt will lie. For this *Hopkins v. The Mayor, &c.*, of Swansea is a distinct authority. In *Bogg v. Pearse*, there was no clear recognition of the right of perception of the salary. It is true, the payment is to be made out of the borough-fund: but the circumstance that the legislature has appointed a mode of payment, does not affect the right of the creditor to payment out of the corporation funds. *Jones v. The Mayor, &c.*, of Carmarthen has no application: the ground of the decision there was, that the duties for the performance of which the town-clerk claimed remuneration, were duties imposed upon him by the act, to be performed gratuitously. If the point now taken be a good one, it would have been an answer to the claim for *expenses* in that case. A limitation of the plaintiff's right is not to be inferred from the circumstance of the statute containing particular directions as to payment of his salary. All the evils which it is suggested would result from holding this action maintainable, would equally result from holding that *case* will lie; and that, it seems to be conceded, might be brought here. So, the same evil would result from the costs of a man damus. That corporations are liable in debt founded upon a statutory duty, is clear from the cases of *Tilson v. The Warwick Gas-Light Company*, 4 B. & C. 962 (E. C. L. R. vol. 10), 7 D. & R. 376 (E. C. L. R. vol. 16), *Cane v. Chapman*, 5 Ad. & E. 647 (E. C. L. R. vol. 31), 1 N. & P. 104 (E. C. L. R. vol. 36), and *Carden v. The General Cemetery Company*, 5 N. C. 253, 7 Scott, 97.(a)

\*JERVIS, C. J.—I am of opinion that the defendants in this case are entitled to the judgment of the court. The view which [\*133

(a) And see *Hitchins v. The Kilkenny and Great-Southern and Western Railway Company*, 9 Q. B. 536 (E. C. L. R. vol. 67).

I take of the first point, renders it unnecessary to enter into any consideration of the other two points, which are involved in some degree of obscurity, by reason of the peculiar wording of the sections of the municipal corporation reform act upon which those questions turn. There seems to be no difference of opinion between the learned counsel who have argued the case, as to the principles which must govern our decision upon the first point. It is admitted that this action of debt cannot be sustained in respect of any contract, express or implied, between the parties. But it is said on the one side, and not disputed on the other, that, in order to maintain this action, there must be a legal right on the one side to receive the money, and a legal liability on the other to pay it: if these co-exist, it is conceded that the action of debt will lie. We may therefore assume that that position is well sustained by the authorities. It is upon the application of that rule that the decision of this case depends. There may be a legal right on the part of this plaintiff to receive the salary to recover which this action is brought: but it seems to me that the second proposition on which his right to maintain the action depends, viz. the legal liability of the defendants, as a corporation, to pay the salary out of their corporate property, is wanting here. The case must be viewed as if the action were brought to recover the debt, not out of any specific fund, but out of any property of which the defendants as a corporation have the administration. If the plaintiff is right, the defendants would be bound to pay out of their corporate property generally, as contradistinguished from the borough-fund. My opinion is, that, when the legislature is creating a power in the council of the borough to appoint an officer and to fix his \*184] salary, and at the \*same time points out a particular fund out of which, and a particular officer by whom, such salary is to be paid, and the party who claims the salary has accepted the appointment with full knowledge of that provision,—he has no right to turn round and say that he will not resort to the prescribed fund, but will have recourse to the general funds of the corporation, and will compel them to waste the corporate property which the act clearly did not intend should be charged with the particular payment. I therefore think, that, when the defendants assumed to appoint the plaintiff recorder of this borough, and to fix the salary which should be payable to him, they imposed upon themselves no other obligation than that of paying such salary out of the borough-fund; and, though the plaintiff by such appointment acquired a right to receive the salary, no personal obligation was cast upon the defendants to pay out of the corporate property. For these reasons, therefore, without entering upon the other questions which were intended to be raised, I think the plaintiff has failed to establish his right to maintain this action.

CRESSWELL, J.—I am entirely of the same opinion. Assuming that Mr. Addison was well appointed assessor and judge of the court of

pleas, that the salary originally awarded to him was well granted, and that the attempt afterwards made to reduce it was not according to law,—still I think that he is not in a situation to maintain an action of debt. The 92d section of the statute provides that the salary of the judge, when appointed and fixed, shall be paid out of a particular fund. His right to have it, therefore, is a right to have it out of that fund, and is not a debt attaching upon the corporation: consequently, it is not a claim in respect of which an action of debt can be maintained.

\*WILLIAMS, J.—I am of the same opinion. I give no opinion [135 except as to whether debt will lie against the corporation to enforce payment of the plaintiff's salary, assuming him to be a salaried officer properly appointed under the statute 5 & 6 W. 4, c. 76. I am clearly of opinion that such action is not maintainable. The plaintiff has no general right to payment of his salary out of the corporate property, as in *Hopkins v. The Mayor, &c., of Swansea*. His right, if any, is, to be paid out of the borough-fund. If that should prove insufficient, he may possibly have some means, by mandamus, or otherwise, of compelling the corporation to make a rate, so as to enable them to pay it. But there clearly is no foundation for an action of debt.

TALFOURD, J.—I am of the same opinion, confining myself to the single point, and upon the grounds stated by my lord and my learned Brothers.

Judgment for the defendants.

\*FOSTER v. CRABB. *May 8.*

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He who has occasion to use a deed is legally entitled to the custody of it; and where several are equally interested in it, either having possession may retain it against the others,—consequently, one cannot maintain detinue against a person in whose hands the party who first obtains possession of it has deposited it, to be redelivered to him on request.

In detinue for an indenture, the defendant pleaded that the indenture in the declaration mentioned was the grant of an annuity to the plaintiff for the life of B., secured upon certain freehold property of B., and the conveyance of that freehold by B. to S., as trustee for the plaintiff, to secure the annuity; and that, after the making of the deed, and before the plaintiff had obtained or had possession of it, and before the detention, and before the commencement of the suit, S. had obtained possession of the deed, and delivered it to the defendant, to be kept, and redelivered to S. To this plea, the plaintiff replied, that S. did not obtain, nor had he possession of, the deed before the plaintiff had obtained possession of the same modo et forma:—Held, that this did not amount to a negative pregnant.

DETINUE, for “a certain deed, to wit, an indenture, bearing date, to wit, the 26th of September, 1842, and made between one George Ball of the first part, the plaintiff of the second part, and one David Colombine and one Edward Bridges Swindall of the third part, which indenture purports to be a grant of a certain annuity of 100*l.* from the said George Ball to the plaintiff, for the life of the said George Ball.”

The defendant pleaded,—that, by the said deed,—after reciting, amongst other things, that the plaintiff had contracted and agreed with the said George Ball for the purchase of an annuity of 100*l.* for and during the life of the said George Ball, for the sum of 650*l.*, to be subject to re-purchase upon the terms thereafter mentioned; and that, upon the treaty for the said purchase, it was agreed that the said annuity should be secured by a conveyance of the hereditaments and premises thereafter described, and an assignment of the policy thereafter recited, upon the trusts and with the powers thereafter expressed and contained of and concerning the same respectively; and that the said annuity should be further secured by the covenants thereafter contained, and by the warrants of attorney thereafter respectively recited,—it was by the said deed witnessed, that, in consideration of the sum of 650*l.* to the said George Ball paid by the plaintiff at or before \*137] the \*execution of those presents, he, the said George Ball, did grant, bargain, and sell unto the plaintiff, his executors, administrators, and assigns, one annuity of 100*l.*, to be paid and payable for and during the life of him the said George Ball, and to be charged and chargeable upon the hereditaments and premises thereafter respectively released and assigned, to have and to take the said annuity unto the plaintiff, his executors, &c., for and during the life of the said George Ball, to be paid and payable as therein mentioned; that, in consideration of the said sum of 650*l.* so paid to the said George Ball by the plaintiff as thereinbefore was mentioned, and in consideration of the sum of 10*s.*, &c., he the said George Ball had granted, bargained, sold, and released, and by the said deed (which in respect of such hereditaments and premises secondly thereafter described as were of freehold tenure, and for the purpose of barring the estate-tail in remainder of the said George Ball therein, were intended to be enrolled in her Majesty's high Court of Chancery in Ireland, in pursuance of the act(a) for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland), did grant, bargain, sell, and release unto the said David Colombine and Edward Bridges Swindall (such parts thereof as are of freehold tenure being in their actual possession by virtue of a bargain and sale to them thereof made by the said George Ball, in consideration of 5*s.*, by indenture bearing date from the day next before the day of the date of the said deed, for the term of one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), their heirs, executors, administrators, and assigns, and which the said George Ball \*188] had any estate, property, right, and title \*to, as therein mentioned, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the

aforesaid messuages, farms, lands, and other hereditaments, and all the estate, right, title, use, trust, property, profit, claim, and demand whatsoever of the said George Ball, in, to, and upon the same hereditaments and premises, to have and to hold the hereditaments and premises first thereinbefore described, &c., subject to the life-estate of the said George Ball, the father of the said George Ball, therein, and as to the lands of Priorstown and Killarty, with the appurtenances, to the said annuity of 150*l.* by the therein-recited indenture of the 23d of February, 1821, secured to and subject to the said sum of 4500*l.* by the therein-recited indenture of the 15th of March, 1851, secured for the benefit of M. J. Ball, E. Ball, and L. Ball, and to the therein-mentioned term of five hundred years for securing the same, and to the sum of 2000*l.* by the same indenture secured for the benefit of the other children of the said George Ball, the father, and Sarah his wife, in case there should be any such other children, unto and to the use of the said David Colombine and Edward Bridges Swindall, their heirs and assigns, during the life of him the said George Ball party thereto, without impeachment of waste,—and to have and to hold such of the hereditaments and premises secondly thereinbefore described, and intended to be thereby released and conveyed, as were of freehold tenure, subject to the life-interest of the said George Ball, the father, therein, unto and to the use of the said David Colombine and Edward Bridges Swindall, their heirs and assigns, for all such estate and interest as the said George Ball, party thereto, could by the said deed lawfully create therein, and absolutely freed and for ever discharged from the estate-tail of the said George Ball, party thereto, under the said recited indenture of the \*15th of March, 1851, or otherwise,—and to [189 have and to hold such of the hereditaments, &c., as are of leasehold tenure, but subject to the life-interest of the said George Ball, the father, therein, unto the said David Colombine, and Edward Bridges Swindall, their executors, &c., for all the term or terms of years now to come and unexpired therein; but, nevertheless, as to the hereditaments thereinbefore described, &c.; and for the trusts, and subject to the powers and provisions hereinafter expressed and declared of and concerning the same, that is to say, upon trust, that, if the said annuity of 100*l.*, or any part thereof, should at any time or times thereafter be in arrear for the space of three months, the said David Colombine and Edward Bridges Swindall, or the survivor of them, or the heirs, &c., of such survivor, their or his assigns, should, by and out of the rents, or by bringing actions against the tenants or occupiers of the same hereditaments and premises respectively for the recovery of the rents, or by such other ways and means as to them or him should seem meet, levy and raise such sum or sums of money as should be sufficient, or as they or he should think expedient, for paying and satisfying to the plaintiff, his executors, &c., the said annuity of 100*l.*, and also the said premises

and other moneys thereafter covenanted to be paid, or such part thereof respectively as should be in arrear and unpaid, and all costs which the said plaintiff, his executors, &c., or the said David Colombine and Edward Bridges Swindall, had been put unto by reason of the non-payment thereof respectively, or otherwise in the execution of the trusts thereby created, and should pay and apply the moneys so to be levied and raised, or a competent part thereof, in or towards payment or satisfaction of the said arrears, premiums, and other moneys, costs, charges, and expenses, accordingly, and pay the surplus, if any, unto \*140] the said George Ball, party thereto, his heirs, &c., for \*his and their own use and benefit; and, subject to the trusts aforesaid, should permit and suffer the said George Ball, party thereto, his heirs, &c., to receive and take the rents of the same hereditaments and premises for his and their own use and benefit: That, for the consideration aforesaid, he the same George Ball, party thereto, did thereby bargain, sell, and assign unto the said David Colombine and Edward Bridges Swindall, their executors, &c., a certain policy of assurance therein mentioned, and the sum of 200*l.* thereby assured, and all other moneys to be had or obtained under or by virtue of the said policy, together with full power and authority to ask, demand, sue for, recover, receive, and give effectual releases and discharges for, the said sum of 200*l.* and all other moneys to be had or obtained under or by virtue of the policy, —To have, hold, receive, and take the said policy and sum of 200*l.* and all other moneys thereby assigned or intended so to be, unto the said David Colombine and Edward Bridges Swindall, their executors, &c., upon and for the trusts, intents, and purposes, and with and subject to the powers and provisions thereafter expressed and declared of and concerning the same: Averment, that, under and by virtue of the said deed, and the premises aforesaid, the said Edward Bridges Swindall and the said David Colombine took and had a property and a right and title to the said deed, and to the possession of the same; and that, after the making of the said deed, and before the plaintiff had obtained or had possession of the same, and before the said detention in the declaration mentioned, and before the commencement of this suit, to wit, on the 26th of December, 1842, the said Edward Bridges Swindall obtained and had possession of the said deed, and the said David Colombine afterwards, to wit, on the 22d of July, 1845, died, and the said George Ball, father of the said George Ball, the party to the said deed, \*141] \*afterwards, to wit, on the day and year last aforesaid, also died: that afterwards, and before the commencement of this suit, and before the said detention by the defendant of the said deed, and whilst the said Edward Bridges Swindall was possessed of the said deed, to wit, on the first of January, 1852, the said Edward Bridges Swindall delivered the said deed to the defendant, to be by him kept, and to be re-delivered by him to the said Edward Bridges Swindall on

request: that he detained and detains, the said deed from the plaintiff for and on behalf of the said Edward Bridges Swindall, by the authority, license, and request, of the said Edward Bridges Swindall to him the defendant for that purpose first given, granted, and made: and that the plaintiff's property in, and right and title to the said deed was and is derived and acquired from and by reason of his being a party to the same, and not otherwise,—verification.

Replication,—that the said Edward Bridges Swindall did not obtain, nor had he, possession of the said deed before the plaintiff obtained or had possession of the same, modo et formâ.

Special demurrer, assigning for causes, amongst others, that the replication traversed immaterial matter, that it alleged a negative pregnant, and that it was ambiguous, uncertain, and double.

*J. Brown*, in support of the demurrer.—The traverse in the replication is a traverse of an immaterial allegation, and it involves a negative pregnant. As the deed in question conveyed the land to Colombine and Swindall, they were entitled to the custody of the deed. And, even assuming that the plaintiff and the trustees had an equal right to the possession, the plea, which shows that Swindall, the surviving trustee, had possession of it, and handed it over to the defendant, to be redelivered to him on request, affords a good answer to the \*action. [\*142 The material point is, whether it is essential in this action, as the plaintiff by his replication supposes, that Swindall got possession of the deed before the plaintiff had possession of it. There is no authority to show that mere priority of possession gives any title. The general rule as to the right to the custody of deeds, is stated in note (O) to Lord Buckhurst's case, 1 Co. Rep. 2 b, and in Sugden's Vendors & Purchasers, 10th edit., vol. 2, pp. 88, 107, 11th edit., vol. 1, p. 453, and seems to be, that they usually go with the estate; but, that, where there are joint-tenants, tenants in common, or coparceners, whichever first obtains possession, may retain the deeds. And see *Whitfield v. Fausset*, 1 Ves. sen. 387, 394. This question more frequently arises upon the necessity of making profert of deeds, as in *Hodgson v. Warden*, 13 M. & W. 22.† [*WILLIAMS, J.*, and *The Thames Haven Dock & Railway Company v. Brymer*, 5 Exch. 696.†] Here, the trustee has to protect himself,—to pay his own charges; therefore, he was entitled to the possession of the deed. [*CRESSWELL, J.*—It is not alleged that the defendant received the deed as the agent or bailiff of the trustee.] In *Viner's Abridgment, Feits* (A. a), pl. 1, it is said that "one coparcener may justify the detaining of the charters of the land in coparcenary against the other, in detinue; for, they belong to her as well as to the other,"—citing M. 3 H. 6, fo. 19 b, pl. 81. Again, pl. 3. "If tenant in fee-simple gives the charters concerning the land to another, the donee, though he has nothing in the land, yet he may justify the detaining them against the heir who has the land,"—citing



M. 10 H. 6, fo. 20 b, pl. 66. No doubt, where a joint-tenant, tenant in common, or parcener, *destroys* the thing held in common, the other may bring trover: Co. Litt. 200 a; Barnardiston v. Chapman, cited in Heath v. Hubbard, 4 East, 121; Murray v. Hall, 7 C. B. 441 (E. C. L. R. vol. 62), 2 Wms. Saund. 47 p.

\*143] \*Then, the replication amounts to a negative pregnant. This is like the case of Jones v. Jones, 16 M. & W. 699,† where, in trespass, the defendants pleaded liberum tenementum in J. S., and justified the trespasses as the servants of J. S., and by his command; and a replication that the defendants did not, as the servants of J. S., and by his command, commit the trespasses, was held bad on special demurrer, as involving a negative pregnant. Pollock, C. B., in giving judgment, there says: "The replication implies an admission that there was a command, and yet does not expressly admit it, and leaves it uncertain what the question is. Further, it would be true if the defendants did not enter at all, and therefore would be a denial of the very fact which both parties previously admitted. We must, therefore, hold it to be ill pleaded, unless we are prepared to say that the rule, that every traverse shall be unambiguous, and not contain a negative pregnant, is exploded, which we certainly are not authorized to say."

*John Gray*, contrà.—This is an action of detinue to recover a single deed, to which both the plaintiff and Swindall are parties. In a case of this kind, where there is such a deed executed, granting an annuity to one party, and conveying land to another in trust to secure the annuity, it is not because the land is conveyed to him that the latter has any right to the custody of the deed. In point of law, the execution of the deed is a delivery to both. [CRESSWELL, J.—Not a manual delivery to either.] Suppose a deed granting close A. to one, and close B. to another: both cannot have actual manual possession of the deed; but he who first obtains it may keep it: and it is immaterial whether the grant to the one be of land, and to the other of money; the same rule prevails. [WILLIAMS, J.—Take the case of a deed conveying \*144] freehold and copyhold, the latter being \*held of a manor where by the custom the youngest son is the heir,—upon the death of the grantee, who would be entitled to the deed, his eldest or his youngest son?] The law upon this subject is very elaborately discussed in Lord Buckhurst's case, 1 Co. Rep. 2 b, Sir F. Moore, 488: and see Dixon on Title Deeds, pp. 12 et seq. Suppose a feoffment of land to A. for the life of B., remainder to C., A., having possession of the deed, would be entitled to retain it against the remainder-man during the life of B.: so, if C. first obtained possession of the deed, he would be entitled to retain it against A. [JERVIS, C. J.—Pending the life-estate?] Yes. There is authority for this in Bro. Abr. *Monstrance de Faits*, pl. 25, citing M. 47 E. 3, fo. 18, pl. 36. In Vin. Abr. *Faits* (Z) pl. 10, 11, it

is said: "If a lease for life be made, the remainder over in fee, this deed appertains to the lord during his life,"—P. 12 H. 4, fo. 20 b, pl. 7; *Banbury v. Briscoe*, 2 Ch. Cas. 42; Bro. *Charters de Terre*, pl. 34; P. 33 H. 6, fo. 22, pl. 23: "and not him in remainder,"—M. 7 H. 6, fo. 1, pl. 2; Dr. Leyfield's case, 10 Co. Rep. 93 b. "But, where the deed is delivered to the remainder-man, he may detain it,"—Bro. *Charters de Terre*, pl. 16; M. 47 E. 3, fo. 18, pl. 36. In Vin. Abr. *Faits* (Z), pl. 15, it is said, that, "if land be given to A. for life, remainder over [to several] by deed, *any of them who first gets the deed* shall retain it. And, therefore, whoever has any land contained in the deed, where others have the residue of the land, yet he that hath this parcel may on account thereof retain the deed:" Per Fairfax and Hussey, Bro. *Charters de Terre*, pl. 53; T. 4 H. 7, fo. 10, pl. 4. *Opie v. Godolphin*, Pr. Ch. 548, shows that the deeds follow the title. *Whitfield v. Faussett*, 1 Ves. sen. 387, merely goes to show that the owner of a rent-charge, under a conveyance on the statute of uses, is not entitled to the possession of the deed, and may therefore plead it without profer. *Primâ facie*, \*the declaration in this case shows a good [\*145 title in the plaintiff. The defendant, in answer to that *primâ facie* case, says, that one of the trustees first obtained possession of the deed, and delivered it to him to keep for him, and that he keeps it under that authority. Why is not the plaintiff at liberty to traverse the first of these propositions? In *Yea v. Field*, 2 T. R. 708, it was held, that, where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title-deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession, on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. And Lord Kenyon said: "Although, at the time of the purchase, the defendant had no right to the possession of the deeds, yet, since that time, they have by accident come into his possession; and the plaintiff cannot recover them from him. To entitle the plaintiff to recover, he should have a better right to the deeds than the defendant; but, in the assignment to him, there is no grant of them. In old conveyances, there is a reservation made of such deeds as tend to deraign the warranty paramount." [JERVIS, C. J.—Assume that the plaintiff first had possession of the deed, and Swindall took it from him forcibly,—would *detinue* lie against him?] It is submitted that it would. A deed is not like an ordinary chattel, which one joint-tenant or tenant in common has an equal right with the other to the use of. [WILLIAMS, J.—Is not the possession of the one the possession of the other?] Though tenants in common of the land, they are not tenants in common of the title-deeds. [WILLIAMS, J.—It is difficult to say, that, if Swindall had been defendant here, the plaintiff could have judgment against

him. And, if this would be a good plea, if the action had been brought against \*Swindall, the question is, whether the plea does not sufficiently identify the defendant with Swindall to make it a good defence for him.] There is no positive allegation that Swindall ever was possessed of the deed at all: the plea merely alleges that "*whilst he had possession of the deed,*" he delivered it to the defendant.

If the allegation of time is material, the plea presents a single point upon which issue might have been taken. "An issue on a negative pregnant, viz. on matter which imports other sufficient matter, is bad," —Com. Dig. *Pleader* (R. 5): "but, if the matter implied be not sufficient, it is not a negative pregnant; as, in debt upon a retainer in husbandry, if the defendant pleads that he did not retain him in husbandry, it is not pregnant; for, a retainer generally is not sufficient to maintain his count:" Com. Dig. *Pleader* (R. 6), citing Bro. *Issue*, pl. 25; H. 38 H. 6, fo. 22, pl. 5.

*Brown*, in reply.—If the court choose to assume that Swindall got possession of the deed by a trick or by force, the defendant may be justified in holding it. In Littleton, § 321, it is laid down, that, "if two have jointly by gift or by buying a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And, in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c., because that their titles and rights in this were several, &c." "Also (§ 322), in the case aforesaid, as, if two have an estate in common for term of years, and the one occupy all, \*147] and put the other out of possession and \*occupation, he which is put out of occupation shall have against the other a writ of ejectione firmæ of the moietie, &c." And see *Murray v. Hall*, 7 C. B. 441 (E. C. L. R. vol. 62), where this court held that trespass quare clausum fregit lies by one of several tenants in common against his cotenant, where there has been an actual expulsion. "In the same manner," says Littleton, § 323, "it is, where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejection de gard of the moietie, &c., because that these things are chattels reals, and may be apportioned and severed, &c., but no action of trespass, viz. quare clausum suum fregit, et herbam suam, &c., conculcavit et consumpsit, &c., et hujusmodi actiones, &c., the one cannot have against the other, for that each of them may enter and occupy in common, &c., per my et per tout, the lands and tenements which they hold in common. But, if two be possessed of chattels personals in common,

by divers titles, as, of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time (quant il poet veier son temps), &c. In the same manner it is of chattels reals, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time." It is difficult to conceive anything more completely applicable to the case now before the court. Detinue is equivalent to ejectment for the entirety. It may be that there would be a remedy, in case, for instance, if the possession were acquired by force or by \*fraud. [JERVIS, C. J.—You are assuming that the plaintiff and Swindall are quasi tenants in common [\*148 of this deed.] If not, Swindall was entitled absolutely to the possession of the deed. This is clear from the second resolution in Buckhurst's case, 1 Co. Rep. 1 b. [WILLIAMS, J.—How so? The primary remedy is upon the annuity deed. It does not appear that the outstanding term was satisfied.] The case in the Year Book of T. 4 H. 7, fo. 10, pl. 4, does not sustain that for which it is cited: and Yea v. Field is pronounced by Sir Edward Sugden to be incapable of being supported; 2 Sugden's Vendors and Purchasers, 10th edit. p. 106.(a)

*Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:—

In the course of the argument of this case, we intimated our opinion that the replication did not amount to a negative pregnant; but we reserved our judgment upon the main point, which is one of some difficulty.

The declaration is in detinue for an indenture of the 26th of September, 1842, between Ball of the first part, the plaintiff of the second part, and Swindall of the third part, being the grant of an annuity from Ball to the plaintiff, of 100*l.*, for the life of Ball. The defendant pleads, in substance, that the indenture in the declaration mentioned is the grant of an annuity to the plaintiff for the life of Ball, secured upon certain freehold property belonging to Ball, and the conveyance of that freehold by Ball to Swindall, as trustee for the plaintiff, to secure that annuity; "and that, after the making of the said deed, and before the plaintiff had obtained or had possession of the same, and before the said detention, and before the commencement of the suit, to wit, &c., \*Swindall had obtained possession of the deed," [\*149 and delivered it to the defendant, to be kept, and re-delivered to him. The plaintiff replies, that Swindall did not obtain, nor had he,

(a) See *Mayhew v. Herrick*, 7 C. B. (E. C. L. R. vol. 62).

possession of the deed before the plaintiff had obtained possession of the same, modo et formâ; and to this there is a special demurrer.

We must first consider the effect of the record in its present state, so as to ascertain the precise question raised by it. The demurrer admits that Swindall did not obtain and have possession of the deed before the plaintiff obtained and had possession of it; and we must, therefore, strike out of the plea the allegation upon which that replication is founded; and the plea will then stand, "that, after the making of the deed, and before the detention, and before the commencement of the suit, Swindall obtained possession of the deed, and delivered it to the defendant." It is consistent with the plea, so understood, that, after the execution of the deed, and before the detention, the plaintiff first had possession of the deed, and that then Swindall got possession of it, no matter how, and, before the detention and the commencement of the suit, delivered it to the defendant. The question is, whether, under such circumstances, the action will lie. We are of opinion that it will not.

It appears upon the face of the deed, as stated in the plea, that the plaintiff and Swindall have each an interest in the deed. The defendant contends that Swindall has the greater interest, because the deed conveys the freehold to him. The plaintiff admits that he has an equal interest with himself, but no more; and we need not determine which of these propositions is correct, because, admitting that the plaintiff is in this respect right, we nevertheless are of opinion that the action will not lie.

It is well established by the second resolution in Lord Buckhurst's case, 1 Co. Rep. 1, and by other authorities, that he who has occasion \*150] to use a deed, is entitled to the \*legal custody of it; but, where two have an equal interest in a deed, and each may have occasion to use it, as, for instance, where the same deed grants Whiteacre to A., and Blackacre to B., as it is manifest that both cannot hold the deed at the same time, to whom does the legal custody belong? If it were a chattel, it might be used in turn by several having an interest in it; but it is not so with a deed, which must remain in some custody until the occasion for using it may arise. Upon this subject there are but few authorities; for, the cases relating to profert do not apply. In the case put, each has a common interest, and each may have occasion to use the deed, but both cannot use it at the same time. The only way of avoiding unseemly contest for the possession, is, to rule that he who first has it may keep it; and this seems to be the result of the only authority which bears directly upon the subject. In Vin. Abr. *Faits* (Z), pl. 15, it is laid down, from Bro. Abr. *Charters de Terre*, and the Year Book, 4 H. 7, fo. 10, that, "if land be given to A. for life, remainder over [to several] by deed, any of them who first gets the deed shall retain it: and therefore, whoever has any land entered in

the deed, where others have the residue of the land, yet he that has this parcel may on account thereof retain the deed."

But this rule does not decide the point under discussion; for, it does not follow that the right to hold a deed is permanently attached to the person who first gets it into his possession, so as to prevent another having an equal interest in the deed from holding it even against the first possessor, should it afterwards come into his custody. The reason which gives to the first possessor a right to hold the deed so long as he retains it in his possession, gives to the other party having an interest in the deed a right to keep it, should it come into his custody. It is the interest which each has in the deed, and \*the occasion which each may have to use it, which gives to each the title to have it. [\*151 In the case put, A. may hold the deed against B., because he has an interest in it, and may have occasion to use it: but B. also has a like interest in it, and may have occasion to use it, and therefore if he get it from A., he may hold it against A. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer. The case of *Yea v. Field*, 2 T. R. 708, would seem to have been decided upon this ground. Conveyancers have questioned this decision; but, in our opinion, that case was properly decided, because, as Lord Kenyon says, "the plaintiff did not show a better title to the deeds than the defendant." The defendant had, in common with the plaintiff, the mortgagee, an interest in the deeds: like him, he might have occasion to use it: the title, therefore, was ambulatory; and, as the defendant had possession of the deeds, he was entitled to retain them against the plaintiff, who had no better title than the defendant, notwithstanding he represented the mortgagee, who first had possession of them.

For these reasons, we are of opinion that the defendant is entitled to judgment. Judgment for the defendant.

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\*BALDWIN and Another v. BAUERMAN. May 7. [\*152

The defendant was described in the writ as "H. W. Bauerman," and entered an appearance as "Henry William Bauerman, sued as H. W. Bauerman:" upon a collateral motion, his affidavit was intituled "Hillary John Bauerman (his true name), sued as Henry William Baurman:"—Held, irregular.

T. JONES, on a former day in this term, obtained a rule calling on the plaintiff's attorney to furnish the defendant with particulars of the

profession, occupation, or quality, and place of abode of the plaintiff, pursuant to the 2 W. 4, c. 39, s. 17.(a)

*Gaselee*, Serjt., for the plaintiff, now objected that the affidavit upon which the rule was obtained, was improperly intituled. It appeared that the defendant was described in the writ as "H. W. Bauerman;" that he entered an appearance in the name of "Henry William Bauerman, sued as H. W. Bauerman," and that, in the declaration, he was described as "Henry William Bauerman, sued as H. W. Bauerman." The affidavit described him as "Hillary John Bauerman (his true name), \*153] sued as Henry William Bauerman." He submitted that \*there was no such cause in court; and he referred to *Shrimpton v. Carter*, 3 Dowl. P. C. 648, where an affidavit intituled "*George Shrimpton v. William Carter the elder*, sued as William Carter," was rejected by Alderson, B.

*T. Jones*, contra.—The only object of the description, is, to ascertain the identity of the party. Here, the man is described as "the above-named defendant:" therefore there can be no doubt. [TALFOURD, J.—The description must be so certain that an indictment for perjury could be sustained. The defendant should be quite sure of his own identity, before he expresses so much anxiety for the identity of the plaintiff.]

The rule was then heard upon its merits, and the case of *Harris v. Holler*, 19 Law Journ. N. S., Q. B. 62, referred to; and ultimately it was discharged upon terms. Rule accordingly.(b)

(a) Which enacts, "that every attorney whose name shall be endorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity; and, if he shall answer in the affirmative, then he shall also, in case the court, or any judge of the same or of any other court, shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall have appeared to have been issued: and, if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance."

(b) See *Sims v. Prosser*, 15 M. & W. 151,† where the writ of summons described the defendant as "*Frederick C. Prosser*," and an affidavit sworn by him in support of a rule for setting aside the judgment for irregularity, the title of which described him as "*Frederick Coulston Prosser*" (his real name), was held irregular.

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\*COOPER v. GRANT. April 24.

A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney:—The court set it aside.

In such a case, the court will not impose upon the defendant the terms of bringing no action.

HAWKINS, on a former day in this term, obtained a rule nisi to set aside a warrant of attorney given by the defendant to the plaintiff, on

the ground of the want of a due attestation under the 1 & 2 Vict. c. 110, ss. 9, 10. The affidavit upon which the motion was founded, stated, amongst other things, that, the plaintiff having agreed to lend him 35l. upon his executing a warrant of attorney to secure the repayment thereof, the deponent (the defendant), on the 13th of January last, accompanied the plaintiff to the office of one Slocombe, an attorney at Reading, whom the plaintiff informed the deponent was his, the plaintiff's, attorney, for the purpose of the deponent's giving Slocombe instructions to prepare the warrant of attorney; but that Slocombe was not then at home; that, in the afternoon of the same day, he saw Slocombe, and informed him that the plaintiff wished to see him, and the deponent and Slocombe went together to the residence of the plaintiff at Reading; that, after the plaintiff and Slocombe had had some conversation in private, the deponent accompanied the latter to his office; that, after he had waited there some time, Slocombe produced to him a warrant of attorney, and asked him whether he had any attorney, telling him that it would be necessary that an attorney should be present on the deponent's behalf when he signed the warrant of attorney; that, upon the deponent's observing that a Mr. Lamb, an attorney at Reading, had done some business for him, Slocombe said, "Oh! I will do it for you both;" that Slocombe then read to the deponent the contents of the warrant of attorney, \*which the deponent then executed, and the said warrant of attorney was then attested by Slocombe, "*the attorney for the plaintiff in this action,*" as attorney for the deponent; and that there was no other attorney present at the time when the deponent so signed the said warrant of attorney, save and except Slocombe.

*J. Brown* showed cause.—The affidavit in opposition to the rule,—that of the plaintiff, Slocombe, and the managing-clerk of the latter,—expressly denied that Slocombe was the plaintiff's attorney, though he *had* so acted upon one occasion, and contradicted several of the material allegations in the defendant's affidavit: it also alleged that the warrant of attorney was prepared by Slocombe solely as attorney for the defendant, who was debited in his books for it; but it at the same time admitted that the defendant had been introduced to Slocombe by the plaintiff, and that Slocombe had, prior to the execution of the warrant of attorney, prepared a memorandum by which the defendant engaged to execute such a security, and professing to authorize the plaintiff to seize and sell the defendant's goods in default of his so doing, and also that Slocombe had acted as the plaintiff's attorney in signing judgment and issuing execution on the warrant of attorney, and seizing the defendant's goods thereunder. The recent cases show that the fact of the attesting attorney being suggested by the plaintiff, or by his attorney, will not of itself invalidate the warrant of attorney: *Pease v. Wells*, 8 Dowl. P. C. 626. In *Haigh v. Frost*, 7 Dowl. P. C. 748, where three defendants went to a particular attorney named by the



plaintiff, and gave him instructions to prepare a joint warrant of attorney from them to the plaintiff, and each of the defendants freely recognised the attorney as acting for him, the warrant of attorney was held good, notwithstanding the provisions of the statute. The sole \*156] question here is, whether Slocombe was really acting as attorney on behalf of the plaintiff. That is distinctly negatived. Being satisfied of the respectability of Slocombe, he did not think it necessary to employ his own attorney in the matter. [TALFOURD, J.—The plaintiff introduced the defendant to Slocombe, and he goes to Slocombe when he wishes to put the warrant of attorney in force.] No doubt he does so: but the court must deal with the case as they would have done on the very day after the execution of the instrument.

*Hawkins*, in support of his rule.—Looking at all the circumstances, it is impossible for the court to arrive at any other conclusion than that Slocombe was acting as the attorney for the plaintiff in procuring the execution of this warrant of attorney. The defendant was introduced to him by the plaintiff. At that time, it is clear that he was not the defendant's attorney; and it is admitted that he had before that time acted as attorney for the plaintiff. If he acted as attorney for the plaintiff, all the authorities show that he cannot act also as attorney for the defendant. What subsequently took place may be relied on to throw light upon what had occurred before. When it became necessary to enforce the security, the plaintiff resorts to Slocombe. In *Haigh v. Frost*, the attorney did not act for the plaintiff at all. *Rising v. Dolphin*, 8 Dowl. P. C. 309, is expressly in point: it was there held, that, where an attorney usually acting on behalf of a defendant, acts on the part of a plaintiff in preparing a warrant of attorney by the former to the latter, his attestation thereto is insufficient: and Patteson, J., said,—“I do not say that it was necessary that any attorney for the plaintiff should have been present. If the warrant had been prepared by some one else, and sent to the defendant's attorney to procure his client's signature, he not charging the \*157] plaintiff, or acting for him in any other manner, it might have been good. But I am satisfied upon the affidavits in this case, that the witness acted as attorney for both; and that, I am of opinion, is contrary to law.” The same point was determined in *Todd v. Gompertz*, 6 Dowl. P. C. 296, and in *Cocks v. Edwards*, 2 Dowl. N. S. 55. *Sanderson v. Westley*, 6 M. & W. 98,† shows how strictly the rule is acted upon. Parke, B., there says,—“We are all of opinion that Goddard was the attorney of the plaintiff prior to his being employed by the defendant, and was his attorney in this transaction. If so, the act is not complied with; since it requires that there should be a *separate attorney employed by the defendant to take care of his interests only*. With respect to the case of *Haigh v. Frost*, there was no wrong decision in point of law, because there was no attorney for the plaintiff, and it

is not necessary that he should have an attorney present on his behalf." Here, the defendant cannot be said to have had a separate attorney to take care of his interests only. In *Pryor v. Swaine*, 2 Dowl. & L. 37, it was held that the *London agent* of the plaintiff's attorney, whose name had been suggested by the plaintiff's attorney, was not a good attesting witness to a warrant of attorney, although the defendant of his own free choice adopted him as his attorney,—where it appeared that he was also acting for the plaintiff's attorney in the transaction.

CRESSWELL, J.(a).—I am of opinion that this rule should be made absolute. The question depends upon the sufficiency of the attendance of an attorney for the defendant at the execution of the warrant of attorney, to satisfy the 9th section of the 1 & 2 Vict. c. 110. That section provides that no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be \*present some attorney of one of the superior courts on behalf of such person, *expressly* [\*158 *named by him, and attending at his request*, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed; which attorney shall subscribe his name as a witness to the execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes, as such attorney. I do not find anything in the statute requiring the presence of an attorney for the person to whom the warrant of attorney is given. But the same attorney cannot act on both sides. All the cases agree in that. The question, therefore, in this case, is, whether Slocombe can be considered as having attended *solely* on the part of the defendant. I am of opinion that he certainly cannot. Upon the defendant's affidavit, I should assume that Slocombe attended as the plaintiff's attorney. But, even taking the facts as they appear upon the plaintiff's affidavit, I should come to the same conclusion. I agree with Mr. Brown that we must deal with the matter as we would have done on the day after the execution of the warrant of attorney. But, in so doing, we may still look at the subsequent conduct of the parties. It appears that the defendant, being desirous of borrowing a sum of money from the plaintiff, the latter introduced him to Slocombe; that Slocombe afterwards conferred with the plaintiff, and then told the defendant he must give a warrant of attorney. Waiving all question as to the conversation alleged to have taken place at Slocombe's office, it appears that a memorandum and warrant of attorney were prepared by Slocombe; and I do not find any statement that the memorandum was ever handed over, nor does it appear in what capacity Slocombe held it. I do not mean to impute anything intentionally wrong to Slocombe: he meant, no doubt, to act correctly; but he has failed to do so. It may be [\*159 \*that this statute, which was designed to guard against fraud,

(a) Jervis, C. J., was attending the Privy Council.

may sometimes be turned into an engine of oppression on the part of the defendant. Still he has a right to come before us and complain that the provisions of the act have not been duly complied with. I think there cannot be any moral doubt that Slocombe was acting for both parties; and this, upon all the decisions, is quite contrary to the spirit of the act.

TALFOURD, J.—I am of the same opinion. I agree that nothing wrong was intended or done by Slocombe, except that he has failed to observe strictly the direction of the statute. I think it is impossible to say that he attended exclusively as attorney for the defendant.

Rule absolute.

*Brown* then suggested, that, under the circumstances, the court would restrain the defendant from bringing an action. [CRESSWELL, J.—We cannot do that. If you have done wrong in point of law, you must take the consequences.] Costs are entirely in the discretion of the court; and it is not unusual for the court to refuse to give costs on setting aside a writ for irregularity, or the like, unless the defendant will undertake not to bring any action.

CRESSWELL, J.—I can very well understand, that, where a party comes to ask the court to exercise its summary discretion, it is competent to the court to impose terms. Here, however, the statute gives the defendant a right; and we cannot say that he shall only obtain it at his own expense. There might be cases where the party has so conducted himself as to justify the court in refusing him costs. But I do not think this is a case of that description.

Rule absolute, with costs.

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\*160] **\*RICKETTS v. THE EAST AND WEST INDIA DOCKS  
AND BIRMINGHAM JUNCTION RAILWAY COM-  
PANY. April 28.**

The duty imposed upon railway companies by the railways clauses consolidation act, 1845, 8 & 9 Vict. c. 20, s. 68, as to the making and repairing of fences between their railways and the adjoining lands, is not more extensive than that imposed upon ordinary tenants by the common law.

Therefore, where the plaintiff's sheep escaped from his close, through his own defect of fences, and, getting into the intervening close of a third party, escaped thence on to the defendants' railway, and was killed :—Held, that the company were not liable.

THIS was an action upon the case. The first count of the declaration stated, that, before and at the time of the committing of the grievances by the defendants aftermentioned, and after the passing of a certain act of parliament called "the railway clauses consolidation act, 1845" 8 & 9 Vict. c. 20, and after the passing of a certain other act of parlia-

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ment called "The East and West India Docks and Birmingham Junction Railway act, 1846," 9 & 10 Vict. c. cccxcvi., the defendants were the owners and proprietors of a certain railway, to wit, a railway from the East and West India Docks, at Poplar, in the county of Middlesex, to the London and North-Western Railway at the Camden Town station of the said London and North-Western Railway, in the parish of St. Pancras, in the county of Middlesex; which said railway of the defendants, during all the time aforesaid ran, and still runs, upon and over certain land taken for the use of the same railway, under the provisions of the statutes in such cases made and provided; and which said railway of the defendants, during all the time aforesaid, was used for the propulsion, drawing, and driving thereon, at great speed, of engines, carriages, and wagons, and upon and over and along which said railway, during all the time aforesaid, divers and very many trains of carriages and wagons propelled, drawn, and driven by locomotive steam-engines, passed and repassed daily and every day, divers times a day, at great speed: That, before and at the time of the committing of the grievances by the defendants \*thereinafter mentioned, he the plaintiff was lawfully possessed of divers, to wit, fifty sheep, [\*161 the property of the plaintiff, of great value, to wit, 150*l.*; which said sheep, before and at the times of the committing of the grievances by the defendants thereinafter mentioned, were depasturing and lawfully being in and upon certain lands, which last-mentioned lands during all the time aforesaid were, and still are, situate, lying, and being, adjoining to and abutting upon the said railway of the defendants, and to and upon the said land so taken for the use thereof: That, after the passing of the said several acts of parliament, and after the taking of the said land for the use of the said railway of the defendants, and after the making of the said railway upon and over the said last-mentioned lands so taken for the use thereof, and whilst the said railway of the defendants was being used for the propulsion, drawing, and driving thereon of trains of carriages and wagons propelled, drawn, and driven by locomotive steam-engines, at great speed as aforesaid, it became and was the duty of the defendants to make and erect a sufficient fence in and upon the said land so taken for the use of the said railway of the defendants, or adjoining to the same railway, for protecting and preventing cattle or sheep depasturing or being in or upon the said lands so adjoining to and abutting upon the defendants' said railway, from straying or escaping out of or off or from the said adjoining lands to or upon the said railway: Yet that the defendants, not regarding their duty in this behalf, did not nor would, after the passing of the said several acts of parliament, or after the taking of the said lands for the use of their said railway, or after the making of the same railway, or whilst the said railway was so being used for the propulsion, drawing, and driving thereon of trains of carriages and wagons propelled,

drawn, and driven by locomotive steam-engines, at great speed as aforesaid,—although a \*reasonable time had elapsed for that purpose \*162] after the passing of the said several acts of parliament, and after the taking of the said land for the use of their said railway, and after the making of the same railway,—make or erect, or cause to be made or erected, in or upon the said land so taken for the use of their said railway, or adjoining to the same railway, a sufficient or any fence, for protecting or for preventing the sheep of the plaintiff, so depasturing and being in and upon the said lands so adjoining to and abutting upon the defendants' said railway, from straying or escaping out of or off or from the said adjoining lands to and upon the said railway of the defendants, but the defendants always neglected and omitted so to do; and that, by means thereof, and for want of such fence, afterwards, to wit, on the 1st of January, 1852, the said sheep of the plaintiff, so depasturing and lawfully being in and upon the said lands so adjoining to and abutting upon the said railway of the defendants, then strayed or escaped out of or off or from the said adjoining lands into and upon the said railway of the defendants, and a certain train of carriages or coal-wagons which were then passing and driven and propelled in, upon, and along the said railway of the defendants, at great speed, then struck the said sheep of the plaintiff which had so strayed or escaped into, and were then upon, the same railway, with great force and violence, whereby and by means whereof twelve of the said sheep of the plaintiff, of great value, to wit, of the value of 40*l.*, were then killed, and five other of the said sheep of the plaintiff, of great value, to wit, 20*l.*, were then bruised and injured, and became and were deteriorated in value.

The second count stated that the defendants, after the passing of the said several acts of parliament, and after the taking of the said land for the use of the defendants' said railway, made and erected, or caused to \*163] be made and \*erected, a certain fence in and upon the said land so taken for the use of the defendants' said railway, sufficient for protecting and for preventing cattle or sheep depasturing or being in or upon the said lands so adjoining to and abutting upon the defendants' said railway, from straying or escaping out of or off or from the said adjoining lands to or upon the said lands so taken for the use of the said railway, or to or upon the railway when made. That the defendants afterwards, and before the committing of the grievances in this count mentioned, made their said railway upon and over the said land so taken for the use thereof, under the provisions of the statutes in such case made and provided: That thereupon afterwards, and after the said fence had been so erected and made, and after the said railway had been so made as aforesaid, and whilst the said railway of the defendants was being used for the propulsion, drawing, and driving thereon of trains of carriages and wagons propelled, drawn, and driven by locomotive steam-

engines, at great speed as aforesaid, it became and was the duty of the defendants from time to time to maintain the said last-mentioned fence so made and erected in and upon the said lands so taken for the use of the defendants' said railway, sufficient for protecting and preventing cattle or sheep depasturing and lawfully being in and upon the said land so adjoining to and abutting upon the said railway of the defendants, from straying or escaping out of or off or from the same adjoining lands to or upon the said railway of the defendants: Yet the defendants, not regarding their duty in that behalf, did not nor would, after the making of the said last-mentioned fence, and of their said railway, and whilst the said railway was so being used for the propulsion, drawing, and driving thereon of trains of carriages, &c., propelled, drawn, and driven by locomotive steam-engines, at great speed, from time to time maintain the said last-mentioned fence so made and erected \*in and upon the said land so taken for the use of the said railway of the [\*164 defendants, sufficient for protecting and preventing the said sheep of the plaintiff, so depasturing and lawfully being in and upon the said lands so adjoining to and abutting on the said railway of the defendants, from straying or escaping out of or off or from the same adjoining lands, to or upon the said railway of the defendants; but the defendants always wholly neglected and omitted so to do. Special damage as in the first count.

Fourth plea, to the first count,—that it was not the duty of the defendants *to make or erect a sufficient fence* in or upon the said land so taken for the use of the said railway, or adjoining to the same, for protecting or preventing cattle or sheep depasturing or being in or upon the said lands so adjoining to and abutting upon the defendants' said railway, from straying or escaping out of or off or from the said adjoining lands to or upon the said railway, *modo et formâ*.

Sixth plea, to the second count,—that it was not the duty of the defendants *to maintain the said fence* so made and erected in and upon the said lands so taken for the use of the defendants' said railway, as in the said second count mentioned, sufficient for protecting or preventing cattle or sheep depasturing or lawfully being in and upon the said lands so adjoining to and abutting upon the said railway of the defendants, from straying or escaping out of or off or from the said adjoining lands, to or upon the said railway of the defendants, *modo et formâ*.

Seventh plea,—that the Great Northern Railway Company, before and at the said several times of the committing of the supposed grievances in the declaration mentioned, were seised in their demesne as of fee, and also possessed, of and in the said lands adjoining to and abutting on the said railway of the defendants, from and out of which the said sheep of the plaintiff \*escaped or strayed into and upon the said railway, as in the declaration mentioned; and that the said sheep of the [\*165 plaintiff, before and at such times aforesaid, and when they so strayed

and escaped as aforesaid, were wrongfully and unlawfully in and upon the said lands of the said Great Northern Railway Company, trespassing and doing damage there, without the leave or license of the said last-mentioned company; and that the plaintiff was not at any or either of the times aforesaid the owner or occupier of the said lands from and out of which the said sheep so escaped or strayed into and upon the said railway as aforesaid.

Demurrer to the fourth and sixth pleas, assigning for causes, that they attempted to put in issue mere matter of law, and did not traverse or deny any matter of fact, or raise any issue in fact which could be tried by a jury; that the allegation in the declaration that it was the duty of the defendants to make and erect a sufficient fence [to maintain the fence made and erected upon the said lands] was not a substantive allegation of fact, but a mere allegation of an inference or conclusion of law, which could not be tried by a jury, and which was not traversable, &c.

Demurrer to the seventh plea, assigning for causes, that the said seventh plea was an argumentative traverse of the allegation in the declaration that the plaintiff's sheep were depasturing and lawfully being in and upon the lands from and out of which they escaped and strayed into and upon the railway, and contrary to the rules of good pleading; that the said seventh plea, and the matters therein set up by way of defence, afforded no answer to the action; that, upon the pleadings, it must be taken, as against the defendants, that the plaintiff's sheep were lawfully being in and upon the land out of which they strayed and escaped on to the defendants' railway; and that the plaintiff was entitled to maintain the action, \*although he might not  
\*166] have had the leave or license of the owner or occupier of the land from which his sheep strayed unto the defendants' railway.

The defendants joined in demurrer.

*T. Chitty* (with whom was *Byles*, Serjt.), in support of the demurrer. —The fourth and sixth pleas are bad, for traversing that which is a mere inference of law from the facts alleged in the declaration: *Trower v. Chadwick*, 3 N. C. 334, 3 Scott, 699. The 68th section of the 8 & 9 Vict. c. 20, enacts that "the company shall make and at all times hereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say,—such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof; also sufficient posts, rails, hedges, ditches, mounds, or other fences for sepa-

rating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway and all necessary styles: and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:" and the section concludes with a proviso, "that the company shall not be required to make such accommodation works in such manner as would prevent or \*obstruct the working or using of the railway, nor to make any [\*167 accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid, compensation instead of the making of them." Taking the act of parliament in connexion with the declaration, a duty is shown to be cast upon the defendants to make and maintain fences so as to prevent injury like that here complained of. This matter was very much discussed in this court in the recent case of *Brown v. Mallett*, 5 C. B. 599 (E. C. L. R. vol. 57), where Maule, J., in delivering judgment, says, —p. 615,—“If the words had been, that the defendant *became bound by law* to do certain acts, it could not be questioned that that was an allegation of matter of law: and the words ‘*it became the duty* of the defendant,’ if they were to be understood as averring the existence of some duty different from that arising out of a legal obligation, certainly would not aid the declaration, inasmuch as the breach of such a duty does not give a cause of action. But, if they be understood, as we think they are, as averring the existence of a legal liability, it is well established that such an averment, being an averment of matter of law, will not supply the want of those allegations of matter of fact from which the court could infer the law to be as stated: so that such allegation is useless where the declaration is insufficient, and superfluous when sufficient without it.” [JERVIS, C. J.—If there may be a liability, by agreement or otherwise, independently of the act of parliament, that is matter of fact. For anything that appears, independently of the act, the plaintiff may be under a liability to maintain his fences. The case, then, stands thus:—In consequence of the plaintiff’s defect of fences, his sheep, by his own default, escaped into another person’s land adjoining the railway; and then, through the default of the defendants, they strayed thence on to the \*railway, and were killed. The plaintiff’s sheep are in Whiteacre; by defect of his [\*168 fences, they get into my Blackacre; and, by my defect of fences, they get into Greenacre, and there fall into a pit, and are killed; who is liable for that?] Not the owner of Greenacre, certainly; nor the owner of Blackacre, who was not bound to fence against Whiteacre. But the statute creates a duty here. [CRESSWELL, J.—You are in this diffi-



culty. The railway company are bound to protect by sufficient fences the owners and occupiers of *lands adjoining the railway*: you are not the owner or occupier of the adjoining land, you are there as a trespasser.] *Fawcett v. The York and North Midland Railway Company*, 20 Law Journ. N. S., Q. B. 222, 16 Q. B. 610 (E. C. L. R. vol. 71), is somewhat applicable. There, in case against the defendants for not keeping gates closed across a highway which crossed the railway on a level (pursuant to the 5 & 6 Vict. c. 55, s. 9), whereby two horses of the plaintiff "then *lawfully* being on the said highway," strayed upon the railway, and were killed, the defendants traversed that the horses were *lawfully* on the highway. It appeared that the horses, having been put into a field of the plaintiff's, the fences of which were sufficiently sound for ordinary purposes, had accidentally escaped, and got into a public road, and thence along the highway through the gate upon the line of railway: and it was held, that, as against the company, the horses were *lawfully* upon the highway. "It is said," observes Patteson, J., "that the horses were not *lawfully* on the highway, because they were coming along the road under such circumstances that the owner of the soil of the highway might have distrained them damage-feasant. However, I much doubt whether he could do this. Perhaps the surveyor of the highways might have sued for a penalty under the highway-act, which, however, would have been of course remitted, because the horses had escaped by accident. \*But, supposing this

\*169] to be so, I am yet to learn that any statute makes railway companies conservators of the rights of the public. It is entirely by their negligence in leaving the gate open that the horses have been killed; therefore, as against the company, I am clear that the horses cannot be said to have been *unlawfully* in the road." So, here, against the defendants, the sheep were lawfully upon the adjoining land. [JERVIS, C. J.—Suppose the owner of a small close adjoining the railway, agrees with the company to dispense with fences, under the proviso at the end of s. 68, and the plaintiff's sheep, through his defect of fences, got on to that close, and thence to the railway,—would the company be responsible for their destruction?] That proviso applies to "accommodation works," such as gates, bridges, arches, culverts, and passages, but not to "fences." [TALFOURD, J.—The facts of this case are nearly identical with those in *Sharrod v. The London and North-Western Railway Company*, 4 Exch. 580.†]

As to the seventh plea,—waiving all formal objections, and assuming that the sheep of the plaintiff escaped out of the plaintiff's close by reason of the defect of fences which the plaintiff was bound to keep in repair, it is submitted, upon the authority of *Fawcett v. The York and North Midland Railway Company*, and on principle, that it is not competent to the defendants to set up as a defence, that the sheep were not lawfully in the close of the Great Northern Railway Company. Davies

*v. Mann*, 10 M. & W. 546,<sup>†</sup> and *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), are distinct authorities to show that the plaintiff is not precluded from recovering for the injury he has sustained, because he himself may to a certain extent have been a trespasser.

*J. Brown*, *contra*.(a)—The defendants, under the \*circumstances, incurred no liability, either statutory or common-law. [\*170] The duty upon which this action is founded, is, a duty to fence against some specific party or parties: there is no instance to be found of a duty to fence generally against all mankind. The precedents are to be found in Lilly's Entries, 70, Hearne's Pleader, 61, Morgan's Vade Mecum, Vol. 3, p. 639, and 2 Chitty on Pleading, 7th edit. p. 591.(b) In *Dovaston v. Payne*, 2 H. Bl. 528, it was held that a plea in bar of an avowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the locus in quo, through the defect of fences, must show that they were passing on the highway when they escaped; it is not sufficient to state, that, *being* in the highway, they escaped. Heath, J., there says: "The law is as my Brother Williams has stated, that, if cattle of one man escape into the land of another, it is no excuse that the fences are out of repair, if they were trespassers in the places from whence they come. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the \*way; for, the property is in the owner of the soil, subject to [\*171] an easement for the benefit of the public. But, on this plea, it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal." That case in substance decides this. [JERVIS, C. J., referred to Fitz. N. B. 128, note,(a)]—"If A. be bound to enclose against B., and B. against C., and beasts escape out of the land of C. into the land of B., and thence into the land of A., A. shall not have trespass against C. But, if A. be bound to enclose against B., and the beasts of B. escape into the lands of A., and thence into the land of one D. a stranger, there D. shall have trespass, and B. be put to a curiâ claudendâ against A.: and so the books P. 10 E. 4, fo. 7, pl. 19, and 36 H. 6, Barr. 68, are to be reconciled."] Sir Francis Leke's

(a) The points marked for argument on the part of the defendants, were,—“That the declaration is bad: that the duty to make and maintain the fence, is larger than the duty imposed by law on the defendants: that the defendants were under no obligation to fence against sheep or cattle trespassing on the lands adjoining, nor at most against any others than the sheep or cattle of the owners or occupiers of the adjoining lands: that the plaintiff ought to have shown that he was either owner or occupier of the lands from which the sheep escaped; and that the declaration does not show anything equivalent to this: that the duty to fence and repair, as laid in the declaration, is a mere allegation of a matter of fact, and is bad for not showing on what such duty is grounded, whether by reason of grant, agreement, possession, or otherwise: that it is a mere question of fact, in every case, whether the railway company, or the owner of the adjoining land is bound to fence between the two properties, and in every case is a traversable matter triable by a jury.

(b) And see the form of a plea of escape by defect of fences, F. N. B. 128, n.

case, 3 Dyer, 365 a, is also an authority to show that the plaintiff can acquire no right from his trespass. In all the cases, the party first in default has been made to bear the loss: *Rooth v. Wilson*, 1 B. & Ald. 59; *Powell v. Salisbury*, 2 Y. & J. 391.† [WILLIAMS, J.—No doubt, according to the principles of the common law, the defendants in *Fawcett v. The York and North Midland Railway Company* would not have been liable. The question is, whether the statute imposes a more extensive liability.] Nothing can be more plain than the language of the 8 & 9 Vict. c. 20, s. 68: it is only the owners or occupiers of the *adjoining lands* who are interested in the making or maintenance of the railway fences. The statute did not intend to impose upon railway companies a greater degree of liability than the old prescriptive common law obligation. The rule of law is thus laid down in the notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a: “The general rule of law, is, that I am bound to take care that my beasts do not trespass on the \*172] land of my neighbour, and he is only bound to take care that his \*cattle do not wander from his land and trespass on mine: *Tenant v. Goldwin*, 6 Mod. 314; *Churchill v. Evans*, 1 Taunt. 529; *Boyle v. Tamlin*, 6 B. & C. 329 (E. C. L. R. vol. 13), 9 D. & R. 430 (E. C. L. R. vol. 22); and therefore this kind of action will only lie against a person who can be shown to be bound by prescription, or special obligation, to repair the fences in question *for the benefit of the owner or occupier of the adjoining land*. And no man can be bound to repair for the benefit of those who have no right. Therefore the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close through the defect of the defendant's fences, unless the plaintiff had an interest in that close, or a license from the owner to put them there; or, if they escaped from an adjoining highway, unless they were lawfully using the highway, that is, passing and repassing there: *Dovaston v. Payne*, 2 H. Bl. 527. The ancient remedy was, by the writ de curiâ claudendâ, which lay for the tenant of the freehold against another tenant of the land adjoining, to compel him to make a fence or wall, which he ought by prescription to make, between his land and the plaintiff's. This writ was abolished by the 8 & 4 W. 4, c. 27, s. 36.” The circumstance of the use made by the company of their railway involving more than ordinary risk, cannot justify the imposition upon them of a larger degree of responsibility than the act of parliament prescribes: *The King v. Pease*, 4 B. & Ad. 30 (E. C. L. R. vol. 24). [JERVIS, C. J.—The duty the breach of which is charged here, can only be due to an individual: no indictment would lie.] To bring this case within *Barnes v. Ward*, 9 C. B. 392, and the class of cases upon which it is founded,—*Blythe v. Topham*, 1 Roll. Abr. 88, Cro. Jac. 158, *Bird v. Holbrook*, 4 Bingh. 628 (E. C. L. R. vol. 13, 15), 1 M. & P. 607, *Sarch v. Blackburn*, 4 C. & P. 297 (E. C. L. R. vol. 19), M. & M. 505 (E. C. L. R. vol. 22), *Lynch v. Nurdin*, 1 Q. B. 29 (E. C. L. R. vol. 41), 4 P. & D. 672, and *Jordin v. Crump*,

8 M. & W. 782,† the plaintiff should \*have shown that the company had been guilty of culpable negligence, or of some invasion of the plaintiff's right. (a) [\*173]

*T. Chitty*, in reply.—The statute clearly meant to impose upon the company a more extensive liability than that imposed by the common law. It may be that the plaintiff's sheep might have been distrainable damage-feasant; but that does not afford an excuse to the defendants for the violation of their duty,—*Vere v. Lord Cawdor*, 11 East, 568.

*JERVIS, C. J.*—I am of opinion that the defendants are entitled to the judgment of the court. This is a case of considerable importance, though in my judgment one of no very considerable difficulty; and the counsel have very properly disencumbered it of all technicalities, in order that it may be disposed of on its merits. The admitted facts are these, viz. That the company were bound to make and maintain fences in the terms of the statute; that the plaintiff was the owner of a close adjoining a close belonging to the Great Northern Railway Company which abutted upon the defendants' railway, the fences of which close of the plaintiff, he, the plaintiff, was bound to repair; and that, by defect of his fences, the plaintiff's sheep escaped into the adjoining close, and thence passed on to the defendants' railway, in consequence of the want of a fence between it and the close of the Great Northern Railway Company, and were killed. There is no allegation that the accident could have been avoided, or that the company had, by themselves or their servants, been guilty of any negligence in that respect. It is admitted that the company were bound to repair as against the owners of the \*adjoining lands; but it is insisted [\*174] that the plaintiff under these circumstances is not entitled to recover. The rule upon the subject is well laid down in the notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a:—"The general rule of law is, that I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land, and trespass on mine,"—*Tenant v. Goldwin*, 6 Mod. 314; *Churchill v. Evans*, 1 Taunt. 529; *Boyle v. Tamlyn*, 6 B. & C. 329 (E. C. L. R. vol. 13), 9 D. & R. 430 (E. C. L. R. vol. 22): and therefore this kind of action will only lie against a person who can be shown to be bound by prescription or special obligation to repair the fences in question for the benefit of the owner or occupier of the adjoining land. And no man can be bound to repair for the benefit of those who have no right. Therefore the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close through the defect of the defendants' fences, unless the plaintiff had an interest in that close, or a license from the owner to put them there." Applying that rule to the facts of the present case, —had the plaintiff any right to have his sheep on the land adjoining the

(a) And see *Gale on Easements*, 297 et seq.

defendants' railway? It is admitted that they were there, not by right, nor under any license from the owners of the close, but through a breach of duty on the part of the plaintiff himself. It is clear, that, if the defendants are only liable to repair so as to protect the owners of the adjoining lands, the plaintiff cannot maintain this action.

The next question is, in what respect does the statute vary the ordinary common-law liability. It seems to me, that, so far from varying the responsibility of the defendants, the statute has most properly taken the common law rule as the measure of their liability. The 68th \*175] section enacts that the company shall make and \*maintain "sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from *the adjoining lands* not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." It seems to me that this liability is not more extensive than the ordinary common-law one. It is said, that, in adopting this view, we shall be conflicting with the decision of the Court of Queen's Bench in *Fawcett v. The York and North Midland Railway Company*. That, however, is not so. The court there held, that, independently of the common law, the statute 5 & 6 Vict. c. 55, s. 9, imposed upon the company an unqualified and unlimited obligation to keep the gates at the ends of level crossings closed against all persons or cattle upon the highway, whether lawfully there or not, and that they were liable to an action for an injury arising from a breach of that duty.

In the third place, it was insisted that, even if there was no common-law liability, and the statute imposed on the defendants no additional duty, the dangerous nature of the trade carried on by the defendants cast upon them an obligation to adopt more than ordinary precautions. The *King v. Pease*, however, is a distinct authority the other way. The legislature has authorized the formation of the railway, and has done all it thought necessary to protect the public, and the adjoining land-owners, by requiring the company to fence off the land adjoining the railway. For these reasons, it seems to me that the defendants are entitled to the judgment of the court.

CRESSWELL, J.—I am entirely of the same opinion. I think it quite plain that the plaintiff cannot be entitled to recover, upon the state of facts which we are now called upon to consider. There is no complaint here \*that the defendants conducted their business in a negligent \*176] manner. The case of *The King v. Pease*, 4 B. & Ad. 30 (E. C. L. R. vol. 24), is a strong authority to show that, the legislature having legalized railways, they are not subject to any liability beyond the ordinary common-law liability, except where the legislature has thought fit to impose it. It seems to me that the duty or obligation cast upon this company by the 8 & 9 Vict. c. 20, s. 68, for the protection of the owners or occupiers of the adjoining lands, is co-extensive with, and

goes no further than the prescriptive liability of the servient tenant. That being so, sheep trespassing upon a close adjoining the railway are not within the protection.

WILLIAMS, J.—I am of the same opinion. The principle of the common law and the authorities upon this subject are placed in a very clear point of view in the case of *Dovaston v. Payne*, 2 H. Bl. 527. Here, the plaintiff's sheep, it is conceded, had escaped into an adjoining close, through the plaintiff's own default, and were there trespassing. The only question, therefore, is, whether the liability thrown upon the defendants by the statute, is limited to the common-law obligation to fence against the adjoining lands, or is a general liability to fence against all the world, so as to bring this case within the principle of *Fawcett v. The York and North Midland Railway Company*. I am of opinion that the act of parliament creates no such general duty, but only a duty as between the company and the owners of the adjoining lands, and those in privity with them; and that a stranger, as this plaintiff is, cannot found an action upon an alleged breach of that duty.

TALFOURD, J., concurred.

Judgment for the defendants.(a)

(a) See *Tupper v. Newton*, post, Hilary Term, 1854.

### \*NOVELLO v. SUDLOW. May 7.

[\*177

By the 2d section of the copyright act, 5 & 6 Vict. c. 45, "copyright," is defined to be "the sole and exclusive liberty of *printing or otherwise multiplying copies*" of any book, &c.: subsequent sections regulate the duration of copyright; and s. 25 enacts that "it shall be deemed personal property, transmissible by bequest, and, in case of intestacy, be subject to the law of distribution."

The 15th section enacts, "that, if any person shall, in any part of the British dominions, *print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause, &c., or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, shall be liable to a special action on the case at the suit of the proprietor of such copyright:*"—

Held, that a publication of a piece of music, not for sale or hire, but by the gratuitous distribution of lithographed copies amongst the members of a musical society, was a publication for which the defendant was liable,—as for an invasion of the property of the proprietor therein,—independently of the 15th section of the statute.

THIS was an action upon the case for an alleged infringement by the defendant of the plaintiff's copyright in a musical composition, called "Benedict's Part-Song, The Wreath."

The declaration alleged that the plaintiff was the proprietor of the copyright of the said musical composition, and had sold and printed and published for sale divers copies thereof, and that the defendant, without his consent, caused to be printed, lithographed, and published divers copies of the said part-song, contrary to the form of the statute, &c.

The defendant pleaded not guilty, delivering with his plea a notice that he should object at the trial that he had not committed any infringement of the plaintiff's copyright in the musical composition in question.

The following case was stated, by consent, for the opinion of this court :—

The plaintiff was publisher and proprietor, as assignee, of a musical periodical called "Novello's Part-Song Book," duly registered at Stationer's Hall, under the provisions of the 5 & 6 Vict. c. 45.

\*178] In May, 1850, a musical composition, with \*accompanying words, called "Benedict's Part-Song, The Wreath," was published amongst other things in the said periodical, and the part which contained that song was sold by the plaintiff until and after August, 1850.

The Liverpool Philharmonic Society, consisting of several hundred persons, was established for the purpose of giving concerts and musical performances for the gratification of the members, and for the promotion of music, and not as a source of profit to the members, who performed gratuitously. There was a committee of management selected from the members; and, in August, 1850, the defendant, as one of the committee, had the management of a concert at which the vocal music was performed by two hundred and fifty members of the society. Many persons not members were admitted to the concert, on payment of a fixed price. It had been resolved that "Benedict's Part-Song, The Wreath," should form part of the performance; and the librarian of the society, by order of the committee, provided the performers with music at the expense of the society. The librarian, by the defendant's directions, copied separately from the monthly number of the plaintiff's work, which had been purchased from the plaintiff, and belonged to the society, the respective musical parts of the bass, soprano, tenor, and alto of the song in question, which in that work were printed together. He caused the separate copies so made to be traced on separate stones, at the expense of the society, and as many impressions to be struck off as there were members of the society about to perform, and no more. This was done solely for the purpose of the concert, and without any intention to sell or let out to hire those impressions, or to use them otherwise than at the society's concerts. After these impressions had been struck off, the tracings on the stones were effaced. After the \*179] concert, the copies remained in the custody \*of the society, and were never used on any other occasion, or in any other manner.

The defendant contended that these facts disclosed no cause of action, and that the declaration was bad. The question for the opinion of the court, was, whether the circumstances so stated showed a sufficient cause of action, and whether the declaration could be sustained.

*Phipson*, for the plaintiff.—The proposition to be maintained by the

defendant in this case, is, that no action lies for the multiplying copies of a work without the author's consent, unless it is done for sale or exportation, so as to bring the case within the 15th section of the copyright act, 5 & 6 Vict. c. 45. The first section of that act recites that it was "expedient to *amend* the law of copyright, and to afford *greater encouragement* to the production of literary works of lasting benefit to the world," and repeals the former acts of 8 Anne, c. 19, 41 G. 3, c. 107, and 54 G. 3, c. 156. The interpretation clause, s. 2, enacts, amongst other things, "that, in the construction of this act, the word 'book' shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, *sheet of music*, map, chart, or plan, separately published; and that the word 'copyright' shall be construed to mean *the sole and exclusive liberty of printing or otherwise multiplying* copies of any subject to which the said word is herein applied." The 8d section gives the author, and his assigns, the sole and exclusive right of printing or otherwise multiplying copies of his work, for the natural life of the author, and seven years after.(a) Then the 15th \*section enacts, "that, if any person shall, in any part of the British dominions, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent *in writing* of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, *knowing* such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such *offender* shall be liable to a special action on the case at the suit of the proprietor of such copyright; to be brought in any court of record in that part of the British dominions in which the offence shall be committed," &c. The question is, whether that section so far controls the common-law right to bring an action for an infringement, as to limit it to the particular circumstances mentioned in that section. In Comyn's Digest, *Action upon Statute* (A. 2), it is laid down, upon the authority of Lord Holt, that, "in all cases where a man has an advantage given to him by force of an act of parliament, he shall have a remedy for it by common law, without the aid of a court of equity." Since the cases of *Millar v. Taylor*, 4 Burr. 2303, and *Donaldsons v. Becket*, 4 Burr. 2408, 7 Bro. P. C. 88, it

(a) "The copyright in every book which shall after the passing of this act be published in the lifetime of its author, shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author, shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."



seems probable that the author's right is only secured by statute.

\*[TALFOURD, J.—The great majority of the judges in that case  
 \*181] thought that there was copyright at common law, and that it was limited by the statute of Anne; and so the House of Lords held. Copyright was dealt with as property long before the statute of Anne.] If so, this is not a mere right now for the first time created. [JERVIS, C. J.—You had better assume, for the purpose of your argument, that there is no copyright at common law.] The remedy given by s. 15 of the now existing act is far less extensive than the right conferred by s. 2. It only applies to the piratical multiplication of copies for sale or exportation, or the importation of copies unlawfully printed abroad, or the sale, publication, or exposure to sale or hire of copies known to have been unlawfully printed or imported. The 16th section,—which requires notice of objections to be delivered by the defendant “in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book,”—does not apply to a case like this. In *Beckford v. Hood*, 7 T. R. 620,—where it was held that an author whose work was pirated before the expiration of the term limited by the statute of Anne, might maintain an action upon the case for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed,—Lord Kenyon said: “All arguments in support of the rights of learned men in their works, must ever be heard with great favour by men of liberal minds to whom they are addressed. It was probably on that account, that, when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining that the  
 \*182] right of publication rested exclusively \*in the authors, and those who claimed under them, for all time: but the other opinion finally prevailed, which established that the right was confined to the times limited by the act of parliament. And that I have no doubt was the right decision. Then, the question is, whether the right of property being vested in authors for certain periods, the common-law remedy for a violation of it does not attach within the times limited by the act of parliament. Within those periods, the act says that the author shall have *the sole right and liberty of printing, &c.* Then, the statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it. Of this there could have been no doubt made, if the statute had stopped there. But it has been argued, that, as the statute, in the same clause that creates the right, has prescribed a particular remedy, that, and no other, can be resorted to. And, if such appeared to have been the intention of the legislature, I should have subscribed to it, however inadequate it

might be thought. But their meaning, in creating the penalties in the latter part of the clause in question, certainly was, to give an accumulative remedy: nothing could be more incomplete as a remedy than those penalties alone; for, without dwelling upon the incompetency of the sum, the right of action is not given to the party grieved, but to any common informer. I cannot think that the legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded, without redress." Ashhurst, J., says: "Where an act of parliament vests property in a party, the other consequence follows of course, unless the legislature make a special provision for the purpose; and that does not appear to me to have been intended in this case." And Grose, J., adds: "There must be a remedy, otherwise it would be in vain to confer a right. I was at first \*struck with [183 the consideration, that six to five of the judges who delivered their opinions in the House of Lords in the case of *Donaldsons v. Becket*, were of opinion that the common-law right of action was taken away by the statute of Anne; but, upon further view, it appears that the amount of their opinions went only to establish that the common-law right of action could not be exercised beyond the time limited by that statute." The case of *The North and South Shields Ferry Company v. Barker*, 2 Exch. 136,† fully sustains the principle now contended for. There, the plaintiffs were incorporated by the 10 G. 4, c. xcvi., for establishing a ferry across the river Tyne, within the limits of Tynemouth and the townships of South Shields and Westoe; and the 85th section enacted, that, after the ferry should be established, no other ferry should be set up and used by any person across the river Tyne, within the said limits; and that, if any person (except the company, or persons acting under their authority) should use any boat or other vessel *of the burthen of four tons or upwards* in ferrying for hire across the river within the limits aforesaid, every person so offending should forfeit 5*l.*: it was held, that the latter part of the 85th section did not limit the general right of ferry, but only added a cumulative remedy by way of penalty. [JERVIS, C. J.—If I honestly sell a book unlawfully printed in England, am I liable?] It would seem not: the statute is evidently aimed at persons knowingly offending. In *The King v. Harris*, 4 T. R. 202, Ashhurst, J., says: "It is a clear and established principle, that, where a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanour." [JERVIS, C. J.—Where a statute gives a particular remedy, does it not restrict \*the common-law remedy?] In the [184 case only to which the specific provision applies.

*Willes*, contrà.—The legislature has precisely defined the amount of protection that authors may receive, with a just regard for the rights

of the public. [JERVIS, C. J.—The preamble shows that the object contemplated by the legislature, was, to give *greater* encouragement to authors, in consideration of the “lasting benefit” the public enjoy from their productions.] It is unnecessary now to discuss the question so elaborately argued in *Millar v. Taylor*,—it being conceded that the statute embraces the whole law upon the subject. [JERVIS, C. J.—That is too liberal a construction of Mr. Phipson’s concession.] *Beckford v. Hood* was not relied on as showing that any common-law right remains; but merely to show, that, under the statute of 8 Anne, c. 19, the common-law remedy for a violation of the author’s right within the period limited for the duration of copyright, was not taken away. It is unnecessary to dispute that; nor is it necessary to dispute the general proposition for which Com. Dig. *Action upon Statute* (A. 2), is referred to, or the doctrine laid down in *The King v. Harris* and *The North and South Shields Ferry Company v. Barker*. It may be admitted, that, if the statute now under consideration imposed a penalty only, it would not preclude the author from maintaining an action upon the case for the damages he may have sustained by reason of the infringement: and that concession disposes of all the authorities which have been cited. The real question is, whether the section which gives a remedy for piracy (s. 15) is explanatory of the previous sections, in one of which (s. 2) “copyright” is defined, and in the other (s. 3) its endurance is provided for; or whether the provision is cumulative. The 15th section, it must be confessed, is somewhat obscure: but the 16th \*185] section is not \*confined to “printing;” it applies to any mode of multiplying copies: and the 17th section shows clearly what it is that the legislature is aiming at, viz. an infringement for the purpose of gain. It enacts, “that, after the passing of this act, it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any port of the united kingdom, or into any other part of the British dominions, for *sale or hire*, any printed book first composed or written, or printed and published, in any part of the said united kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and, if any person not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, *for sale or hire*, any such printed book into any part of the British dominions, contrary to the true intent and meaning of this act, or shall knowingly sell, publish, or expose to sale, or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise,” &c. This shows clearly that the legislature did not intend to interfere with persons who were not moved with a desire of profit. The statute 5 & 6 Vict. c. 45, is the compact between the author and the public. [WILLIAMS, J.—Lord Campbell, giving the

judgment of the court of error, in *Boosey v. Jeffreys*, 6 Exch. 580, 592,† says: "The first question discussed before us, was, whether authors have a copyright in their works at common law. This is not essential for our determination of the present case. If it were, we are strongly inclined to agree with Lord Mansfield and the great majority of the judges, who, in *Millar v. Taylor* and *Donaldsons v. Becket*, declared themselves to be in favour of the common-law right of authors." JERVIS, C. J.—The Court of Exchequer, in *Boosey v. Purday*, \*4 Exch. 145,† took the other view, and agreed with the minority in *Millar v. Taylor*.] [\*186

*Phipson*, in reply.—Assuming, though not conceding that the common-law right of the author is merged in the statute, the remedy provided by the 15th section clearly is not the only remedy he has for the invasion of his right. For what is not specifically provided for in that section, the author may still resort to his common-law remedy by an action for damages. The 15th section does not embrace all the mischiefs the statute was meant to cure. *Cur. adv. vult.*

TALFOURD, J., now delivered the judgment of the court:—

The plaintiff by his declaration alleged that he was proprietor of the copyright in a book, being a musical composition, and that, while such copyright was subsisting, the defendant, without his consent, wrongfully printed, lithographed, and published, divers copies of the same work, contrary to the form of the statute, whereby the sale of the book was injured, and he, as proprietor of the copyright, sustained damage. The defendant pleaded not guilty.

The parties, by consent, stated a case, in which the sufficiency of the declaration, and the effect of the facts agreed on, are presented for our decision. The effect of the statement, is, that the defendant, a member of a Philharmonic Society, desiring to perform the music of the work in question at a concert, consisting of its members and of persons admitted for money, caused portions of the plaintiff's work to be lithographed for the use of the members of the choir, in number two hundred and fifty, and who were, without the consent of the proprietor of the copyright, supplied with \*lithographed parts of the composition [\*187 to a correspondent extent, by the defendant's sanction.

The question arising on the declaration,—which alleges a printing and publishing, without alleging that the publication was for sale or hire,—and upon the facts, is, whether the multiplication of copies of the work in which the plaintiff had subsisting copyright, not being for sale or hire, gave a right of action.

The case was argued before us, on both sides, with an abstinence from the consideration of the question left undecided by the case of *Millar v. Taylor*,—whether, at common law, authors have copyright in their works: the learned counsel on both sides agreed in considering the case as dependent on the construction to be applied to the statute

5 & 6 Vict. c. 45, whereby the previous acts relating to literary copyright are repealed, and the term they had defined is extended; and the view which we take of this case enables us to adopt the position taken by the parties, and to decide it on the construction of that statute.

The interpretation clause of that act, which precedes its other provisions, enacts, "that the word *copyright* shall be construed to mean the sole and exclusive liberty of printing or *otherwise* multiplying copies of any subject to which the word is herein applied." The 8d section defines the duration of such copyright; several subsequent sections treat such copyright as property; and section 25 enacts that "it shall be deemed personal property, transmissible by bequest, and, in case of intestacy, be subject to the law of distribution."

It was conceded, on the argument, and admits of no doubt, that, if the statute, thus vesting a peculiar property, had contained no provision for the redress of its infringement, the ordinary rule by which the common law gives an action on the case for the violation of rights conferred by statute, would apply, and would \*render the multi-  
\*188] plication of copies by lithography, without the consent of the proprietor, admitted in this case, the subject of such an action as that before us. But it was contended that the statute 5 & 6 Vict. c. 45, by giving, in section 15, a remedy by action in cases which do not involve the subject of complaint, operates a limitation of the right before conferred, and thus prevents the ordinary rule from attaching. It was not denied, that, according to the doctrine of *Beckford v. Hood*, if the statute had, like the 8 Anne, c. 19, given penalties for infringement of copyright, even in the same clause which defined the right, the party aggrieved would not thereby be deprived of the remedy by action which the common law would attach to his right: but it was argued, that, as, by the clause in question a remedy is given by action, such remedy must be taken to be co-extensive with the right. By this clause it is enacted, "that, if any person shall print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such written consent as aforesaid, such offender shall be liable to a special action on the case, at the suit of the proprietor of such copyright."

In answer to the argument that this clause purports to apply the remedy by action to all cases of infringement, it was urged for the plaintiff, that its object might be especially to provide, in the case of

infringement by printing or publishing for sale or hire, that a written \*consent should be necessary to the justification of such acts by a stranger to the copyright; and the peculiarity of the expression "special action on the case," and the description of the party against whom the remedy is given, as "an offender," were referred to as indicating the intention, or, at least the spirit, of the legislature. The language, however, of the clause is not new; it is adopted from the corresponding section of 54 G. 3, c. 156 (s. 4), which it follows, except that, instead of repeating the words "without the consent in writing," to each condition of infringement, it uses the words "so unlawfully printed," &c., which were, perhaps incorrectly, adopted to avoid repetition. Whether the words so substituted have the effect of implying the necessity of written consent, or whether the last words, "without such written consent as aforesaid," apply to all the antecedents,—are questions only incidentally raised, as affording arguments or illustrations of the matters in discussion, and which we do not feel it necessary to decide.

A more important consideration arises from the difference between the description of the exclusive right conferred on authors by the statutes of 8 Anne, c. 19, and 54 G. 3, c. 156, and that defined by the 5 & 6 Vict. c. 45. By the statute of Anne, such right is expressed to be "the sole right and liberty of printing and reprinting;" by the 4th section of the 54 G. 3, which extends the term of copyright, it is called "the sole liberty of printing:" whereas, by the interpretation clause of the 5 & 6 Vict., it is expressly defined to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is therein applied;" thus protecting literary works from unauthorized multiplication by other means than the press. Now, the 15th section applies its remedy by action only to cases where the subject-matter is \*multiplied by printing; and therefore, if this clause is regarded as restrictive of the remedy it gives to the cases which it enumerates, to the exclusion of the common-law consequence of remedy for wrong, it must be construed as destroying the effect of the words "otherwise multiplying," which point in the most distinct manner to modes of infringement not before rendered illegal.

We cannot think that such a restriction could be in the purpose of the legislature, which would have been directly accomplished by omitting to introduce the words "otherwise multiplying;" and therefore we conclude that it is impossible to gather from the 15th section that clear intention to limit a right expressly given, which is necessary to the argument for the defendant.

It may also be observed, that the following section (s. 16), when requiring the defendant to give notice of his objection to the author's claim, "in any action for printing any such book for sale, hire, or ex-

portation," implies that an action will lie for printing for hire, to which the special action on the case given by the 15th section is not in terms applied, and thus fortifies the conjecture that the 15th section was not intended, by enumerating certain cases of infringement, to take away the common-law remedy in all others. It is, however, enough for us to determine that we cannot collect from these or any other clauses of the act an intention of the legislature to restrict the right which in express terms it gave.

It is admitted that the plaintiff possesses that right: the act of the defendant in multiplying copies of his work, without his consent, for extensive, though gratuitous, circulation, is a violation of that right: the remedy by action on the case, therefore, attaches, on principles which are not disputed; and the plaintiff is, consequently, entitled to our judgment.

Judgment for the plaintiff.

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\*ROBINSON *v.* GELL. *May 1.*

The county courts act, 9 & 10 Vict. c. 95, imposes no duty upon the clerk of the court to prepare or cause to be prepared notices of judgments or orders of the court for the payment of money (whether by instalments or otherwise), for service upon the defendant; nor is any such duty to be inferred from No. 114 of the rules prepared by the judges in pursuance of the 12 & 13 Vict. c. 101, s. 12,—such rules not being a judicial exposition of the statute, but mere practical directions for the guidance of the officers of the court in the performance of the duties which are imposed by the statute.

No action, therefore, lies against the clerk for omitting to prepare such a notice, or for negligently preparing it, whereby the defendant was misled as to the times of payment of certain instalments ordered by the judge, and had his goods taken in execution.

THIS was an action upon the case. The first count of the declaration stated, that, after the passing of the 9 & 10 Vict. c. 95, and before and at the time of the committing of the grievances thereafter next mentioned, the defendant was clerk of the county court of Cheshire, holden in pursuance of the said act; that, on the 24th of October, 1851, at a sitting of the said county court in a certain cause then pending in the said court, in which Charles Cook and Nathaniel Cook were the plaintiffs, and George Molyneux and the now plaintiff were defendants, it was adjudged by the said judge of the said county court, that the plaintiffs in the said cause should recover against the defendants in the said cause the sum of 18*l.* 19*s.* 8*d.* debt, and 4*l.* 16*s.* 8*d.* costs, amounting together to the sum of 18*l.* 16*s.* 4*d.*; that *thereupon* it was ordered by the said judge that the defendants in the said cause should pay the said sum of 18*l.* 16*s.* 4*d.* to the now defendant, as such clerk as aforesaid, by instalments of 3*l.* down, and 10*s.* for every week afterwards until such time as the said sum of 18*l.* 16*s.* 4*d.* should have been paid by the defendants in the said cause, and that the first of such

instalments should be paid on the 31st of October, 1851; that the now plaintiff had not then, or at any time before the committing of the grievances, any notice or knowledge of the said judgment and order, except as thereafter mentioned; that it was the *practice* of the said county court, that, \*when any such order was made by the judge [\*192 for the time being of the said county court, for the payment by instalments of any moneys recovered in the said county court, the clerk for the time being of the said county court should prepare, or cause to be prepared, a notice in writing of such order, to the intent and in order that the same might be delivered to, or left for, the person or persons so by the said order directed to pay such moneys; that it was the *duty* of the defendant, as such clerk as aforesaid, to prepare, or cause to be prepared, every such notice as aforesaid; and that, in accordance with the said practice, it was the *duty* of the defendant, as such clerk as aforesaid, to prepare, or cause to be prepared, a notice of the said order so made by the said judge in the cause aforesaid, and to take due and proper care in and about preparing, or causing to be prepared, the said notice, that it should truly and accurately set forth and notify to the plaintiff the order of the said judge as aforesaid; yet that, although the defendant, as such clerk, then, and immediately after the making of the said order, and before the committing of the grievances, to wit, on, &c., did prepare, or cause to be prepared, a notice purporting to be a notice of the said order, and the said notice so prepared was delivered to, or left for, the now plaintiff, who then received and had sight of the same, he, the defendant, as such clerk, so negligently, and contrary to his duty in that behalf, prepared, and caused to be prepared, the said notice, and took such bad care in and about the preparation thereof, that, by and through the mere carelessness, negligence, and breach of duty of the defendant in that behalf, the said notice did not truly or accurately set forth or notify the said order, but, on the contrary thereof, inaccurately and erroneously set forth and represented that the said instalments of 10s. each, which, by the said order of the said judge were directed to be paid by the said George \*Molyneux and the now plaintiff (the defendants in the said [\*198 cause) *weekly* as aforesaid, were to be paid by them *monthly*; and that, although the defendants in the said cause, in accordance with the said order, duly paid, or caused to be paid, the sum of 3l., and further paid, or caused to be paid, the said first instalment of 10s. on the day in that behalf in the said order appointed, yet that he, the plaintiff, confiding in the said notice so prepared and delivered by the defendant, and then believing the same truly and accurately to set forth and represent the said order of the said court, did not, on the day when the several instalments which by the said order were directed to be afterwards paid in each successive week, and which thereby became payable before the time of committing the said grievance, pay the



same into court for the said Charles Cook and Nathaniel Cook at the several times so by the said order in that behalf directed and ordered, but therein made default; and that thereupon the said Charles Cook and Nathaniel Cook, after such default, and by reason thereof, and before the commencement of this suit, to wit, on, &c., caused to be issued out of the said county court, and under the seal of the said court, in the said cause, a certain warrant of execution against the goods of the plaintiff, to levy debt and costs and expenses amounting to 16*l.* 1*s.* 8*d.*, and the said warrant was afterwards, to wit, on, &c., executed, and divers goods and chattels of the plaintiff under the authority of the said warrant seized and sold, and the plaintiff thereby lost the said goods, and was greatly injured in his credit, &c.

The second count, after alleging that it was the duty of the defendant as clerk to cause a notice in writing of the order to be prepared, and to take proper care that no execution should issue founded upon the judgment and order, without such notice having been prepared, alleged as \*194] a breach of the defendant's duty the neglect to cause *any* notice to be prepared, and damage to the plaintiff in consequence, as in the first count.

General demurrer.

*Cowling*, in support of the demurrer.—The declaration is bad. It assumes that it is the duty of the clerk of the county court, not to cause to be served, but, to prepare, a written notice of the judgment; and that no execution can lawfully issue until such notice has been prepared. It appears that an action was brought in the county court against the plaintiff and Molyneux for a debt which is admitted to have been due; and, at the hearing, the judge made an order upon them for the payment of 3*l.* down, and the residue by instalments of 10*s.* per week. Whether either the plaintiff or Molyneux were present on that occasion, is not stated; probably the plaintiff was not, as it is averred that he had no notice or knowledge of the judgment otherwise than from the incorrect notice which was afterwards served upon him. But the order must be taken to have been made in the actual or constructive presence of both defendants. The 92d section of the 9 & 10 Vict. c. 95, empowers the judge to make orders "concerning the time or times, and by what instalments, any debt or damages or costs for which judgment shall be obtained," shall be paid. The 94th section enacts, "that, whenever the judge shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof forthwith, or at the time or times, and in the manner, thereby directed, by execution against the goods and chattels of the party against whom such order shall be made: and the clerk of the said court, at the request of the party prosecuting such order, shall issue under the seal of the court a fieri facias," &c. And the 95th section provides, "that, if the judge shall have made any order for

payment of any sum of money by \*instalments, execution upon such order shall not issue against the party until after default [\*195 in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for such portion thereof as the judge shall order, either at the time of making the original order, or at any subsequent time, under the seal of the court." There is no intermediate state between the order of the judge and the issue of the execution. *Ely v. Moule*, 5 Exch. 918,† is a distinct authority to show that service of the order or judgment is not necessary,—except, perhaps, where it has been varied by a subsequent order, in which case, it seems, the amended order should be drawn up and served. Parke, B., there says: "On full consideration, I am of opinion that it is not necessary to serve the order; for, in all courts, the suitors who are present are bound to take notice of the judgment of the court, without any service upon them; and, by the 80th section of the 9 & 10 Vict. c. 95, a person who has been summoned to the county court, and neglects to attend, is in the same situation as if he were personally present at the hearing of the cause. An order of this description is in the nature of a judgment, not of a rule of court; and therefore, on the principle already stated, the defendant is bound to take notice of the amount adjudged to be paid, and of the time for payment; and, if he does not comply with the order, the court is authorized under the 94th section to issue execution." Here 3*l.* of the debt was to be paid down; it would therefore be impracticable to draw up and serve the order with any effect. The duties of the clerk of the court are defined by s. 27: amongst other things, he is to "register all orders and judgments of the said court;" but it is nowhere said that he is to prepare copies. [JERVIS, C. J.—In schedule D., I find the clerk is to have a fee for \*"entering and drawing up every judgment and order, [\*196 and *copy thereof*."] That does not mean copy for service upon the defendant: if so, there must be as many copies as there are defendants. [JERVIS, C. J.—In the same schedule, I find a fee to the high-bailiff, for "serving every summons, *order*, or subpœna." That was referred to in the course of the argument in *Ely v. Moule*; and Alderson, B., observed,—"That means interlocutory order:" and Parke, B., added,—"I do not find any case in which the service of a judgment is required by the statute." [JERVIS, C. J.—That case would have been more satisfactory if *Byrne v. Knipe*, 5 D. & L. 659, had been cited in it.] The word "copy," in the schedule would be satisfied by the sealed copy which is made evidence of entries in the minute-book, by s. 111. There is nothing in the rules made pursuant to the 12 & 13 Vict. c. 101, s. 12, which expressly requires notice of the order or judgment to be served upon the defendant. Besides, the

mere nonfeasance, or the misfeasance, of a mere matter of practice, cannot give a ground of action.

*Welsby*, contra.—The declaration is sufficient: the first count charges the defendant with a misfeasance, the second with a nonfeasance of a duty imposed upon him by the statutes and the rules framed under their authority. It clearly was the duty of the clerk of the court to draw up the order in question. The 27th section of the 9 & 10 Vict. c. 95, enacts that "the clerk of each court shall issue all summonses, warrants, precepts, and writs of execution, and register all orders and judgments of the said court, and keep an account of all proceedings of the court," &c. This is in the nature of a warrant or a precept: the 92d section shows plainly that it is not a judgment, which imports payment *forthwith*. It falls precisely within No. 114 of the rules prepared and \*certified under the authority of the 12 & 13 Vict. c. 101, s. 12, which rule provides that "orders for payment of money or costs, or both,—and orders of adjournment, when directed by rule 85 to be served,—*shall in all cases be served* by the bailiff of the home court, or be sent by him in a prepaid post letter *to the party ordered to pay the same*: provided always, that it shall not be necessary for the party in whose favour such order was made, to prove that it was served, previous to taking proceedings thereon." Service can only be by delivering the original or a copy. [WILLIAMS, J.—If notice be required, surely the thing is irregular without notice.] *Ely v. Moule* is clearly distinguishable: that was obviously a *judgment*: and the court throughout deal with the case as if the question was whether the foundation of the proceeding was a judgment or a mere order. Martin, B., says: "The question is, whether this is an order or a judgment. If it be a judgment, it need not be served: if it be an order in the nature of a rule of court, it requires service. It is clear to me that it is a judgment. The real difficulty arises from inserting in the order the direction as to the mode of payment. But the word '*forthwith*' shows that no time was intended to be given. What is the nature of a debt? When a debt is due, it is the duty of the debtor to pay it, and the creditor may bring an action without any demand. This was a debt the moment the judgment was given, and the law casts on the debtor the duty to pay forthwith, or execution may at once issue." [WILLIAMS, J.—The 94th section of the 9 & 10 Vict. c. 95, shows that the terms "order for the payment of money," and "judgment," are used synonymously.] The practice of the court requiring a notice to be served, and the plaintiff having sustained damage from the defendant's negligence in preparing it, the latter surely must be responsible.

\**Cowling*, in reply.—The argument on the part of the plaintiff \*198] fails, unless there is a distinction between a judgment and an order for the payment of the debt,—which s. 94 shows there is not.

The judgment would be incomplete, unless it went on to order the times of payment, where the judgment is, to pay by instalments. If the notice is required only by the practice of the court, the omission to serve it, or an erroneous notice, is at the most an irregularity, which might give the party a right to apply to set it aside, but clearly no cause of action. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the Court:—

The question in this case is raised by general demurrer to the declaration, which contains two counts,—the first of which is founded upon a misfeasance, the second upon a nonfeasance of the defendant's alleged duty.

It will be convenient to consider the second count first; for, that raises the question of duty common to both counts, unencumbered by other counts.

That count, after referring to the judgment and order set out in the first count, avers that it became the duty of the defendant, as clerk of the court, to prepare a notice in writing of such order, to the intent that the same might be delivered or transmitted to, or left for, the plaintiff, as the defendant in that cause, and to take care that no execution should issue out of the court founded upon the said judgment and order, without such notice having been first prepared and made out. It then alleges that the defendant did not prepare such notice, and that, through the mere negligence and breach of duty of the defendant, the plaintiff did not receive any notice of the order, and was wholly ignorant of the making thereof, by reason whereof he neglected \*to pay [\*199 the instalments of the debt, and certain consequences followed of which he complains.

The allegation of duty in this count is not a matter of averment and proof. To make the defendant liable, he must have omitted to perform some legal duty. The statute 9 & 10 Vict. c. 95, imposes no such duty, in terms; the 27th section, referred to by the plaintiff's counsel, being confined to the issuing of summonses, warrants, precepts, and writs of execution; and the 92d, 94th, and 95th sections, which empower the judge to order payment by instalments, and define the mode of proceeding for the recovery of the debt, being silent upon the subject. But it is said that the new orders, clause 114, cast this burthen upon the county-court clerk, because "all orders for payment of money or costs, or both, shall in all cases be served by the high-bailiff of the home court," &c.; and, as the clerk is the proper officer to make out all documents to be served by the high-bailiff, the duty of making a copy of this order, for service, is cast upon the county-court clerk. In our opinion, this order has no such operation: it does not enlarge the duties of the county-court clerk beyond the provisions of the act of parliament, but was framed merely for the purpose of pointing out by whom the service was to be made of orders which required service by

the provisions of the act of parliament, or by the practice of the court. As, in the construction of the former rules, it was holden that the word "judgments" in rule 14 did not make it necessary to serve a copy of the judgment; so, here, these orders are not a judicial exposition of the statute, but, assuming that certain orders for the payment of money and costs may require service, say that such service shall be made by the high-bailiff of the home court.

But it may be, that, without express enactment, and without reference \*200] to the new rules, the order ought to have been served, and the defendant may be liable for not having performed his duty in that respect. It will be unnecessary to discuss the defendant's liability, in this view of the case, if in our opinion it was not necessary to serve this order: and we are of that opinion. This point is in effect decided by the case of *Ely v. Moule*, 5 Exch. 918.†

The first count of this declaration, referred to in the second count, states that judgment was given for the debt and costs, and that *thereupon*, that is, at that time, it was ordered that the debt should be paid by instalments. The order for payment is in this case, therefore, a part of the judgment; and it becomes unnecessary to decide what ought to have been done, if the judgment had been varied by a subsequent and distinct order; because the plaintiff was actually present, or constructively so, by operation of the 80th section, when the judgment was delivered, and, the order being part of the judgment, no service was necessary.

These observations dispose also of the principal question upon the first count, which proceeds upon a misfeasance of the defendant's alleged duty, in this, that he made out an incorrect copy of the order for payment by instalments, which, being served upon the plaintiff, misled him, and induced him not to pay the instalments in due time. If the defendant was not legally bound to make out any notice, the fact of his having made out an inaccurate notice will not give the plaintiff a cause of action: and we have already expressed our opinion upon that point.

But this count contains a further allegation, viz. that it was the practice of the county court, for the clerk to make a copy of orders for payment by instalments, to be served upon the defendants. If such a practice exist, it may be contended that the proceedings in \*201] question were irregular. But we need give no opinion upon this point; for, whether they were regular or irregular, no action will lie against the clerk, at the suit of the defendant in the cause, for a mere irregularity of this description.

It is to be observed that the legal practice of the court is prescribed by the act of parliament and the rules founded upon it. It may be that the form of the rule and the schedule of fees which gives a fee for the service of the notice of judgment, may have led, in point of fact,

to the practice of serving a notice of the judgment in every case: but, in our opinion, these do not warrant such a practice; and they certainly do not establish the legal necessity of pursuing such a course in a case like the present.

For these reasons, we are of opinion that the defendant has not been guilty of a breach of duty, and is entitled to the judgment of the court.

Judgment for the defendant.

**\*GLEDSTANES and Others v. ALLEN and Another. May 9. [\*202**

By a charter-party, it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers' factors, and proceed thence to London, and there deliver the same on being paid freight "a lump sum of 2800*l.*, in full of all charges." At the end of the charter-party was the following clause,—"*The captain to sign bills of lading at any rate of freight, without prejudice to this charter.*" In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any."

Under this charter-party, the charterers shipped at Penang goods as their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honour bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question:—

Held, that the owners had a lien upon the goods for the entire lump freight.

TROVER for 1000 baskets of sugar, 2000 bags of sugar, 100 puncheons of rum, 20 cases of mace, 50 cases of nutmegs, 100 cases of spices, 2000 bags of rice, and 10,000 bundles of rattans, of the value, to wit, of 10,000*l.*

The defendants pleaded not guilty, and not possessed.

The following case was stated for the opinion of the court, by consent of the parties, pursuant to the 3 & 4 W. 4, c. 42, under a judge's order.

The plaintiffs are, and in the years 1847 and 1848 were, the partners in and constituted the firm of Gledstanes & Co., carrying on business in the city of London as merchants. The defendants were in the years 1847 and 1848 the owners of the ship *Lalla Rookh*. In those same years, George Stuart and Stuart Heriot carried on business as merchants in Penang, under the firm and style of Stuart & Co. The said George Stuart was then resident in London, where he carried on business as a merchant, under the firm and style of George Stuart & Co.

On the 18th of June, 1847, the said George Stuart, by and under the name of his said firm of George Stuart & Co., and as agent for Stuart & Co. of Penang, entered into a charter-party with the defendant John M'Cutcheon, for himself and the other defendant Edward Allen, as owners of the *Lalla Rookh*, of which the following is a copy:—

\*203] \*"London, 18th June, 1847. It is this day mutually agreed between John M'Cutcheon, Esq., owner of the good ship or vessel called the *Lalla Rookh*, A. 1, W. H. Haines, master, of the measurement of 350 tons, or thereabouts, now lying in London, and Messrs. George Stuart & Co. of London, merchants, as agents for Messrs. Stuart & Co., of Penang: That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Penang (after discharging her cargo of coals at Aden), or as near thereunto as she may safely get, and there load from the factors of the said merchants a full and complete cargo of legal merchandise not exceeding what she can reasonably stow and carry over and above her tackle, provisions, and furniture; and, being so loaded, shall therewith proceed to London, or as near thereunto as she may safely get, and deliver the same on being paid freight as follows, viz., a lump sum of 2800*l.* in full of all charges: The cargo to be brought to and taken from alongside at the expense and risk of freighters (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted); 400*l.* on account of freight to be paid in cash on arrival, and remainder, on unloading and right delivery of the cargo, by approved bills at two months following; cash for the disbursements of the vessel to the extent of 200*l.* to be advanced free of interest and commission, and deducted from the freight: forty-five running days are to be allowed the said merchant (if the ship is not sooner despatched) for loading and to discharge in any dock the freighters may appoint, and ten days on demurrage over and above the said laying days, at 6*l.* per day: Penalty for non-per-

\*204] formance of \*this agreement, 2800*l.* It is understood that the freighters are to pay all port-charges at Penang. *The captain to sign bills of lading at any rate of freight, without prejudice to this charter.* In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any. A commission of 5 per cent. to be allowed to charterer's agents at Penang.

"Witness,

"James Dawson."

(Signed)

"G. STUART & Co.

"JOHN M'CUTCHEON."

The *Lalla Rookh* arrived at Penang on the 3d of February, 1848, and was there laden with a full cargo, the greater part of which was shipped by Stuart & Co., and the residue by other merchants at Penang. The goods so shipped by Stuart & Co. were 818 bags and 630 baskets of sugar, 64 puncheons of rum, 1612 bags of rice, 31 cases of spices, and a quantity of bundles of rattans for stowage. Of the sugars and rum, part was the property of Stuart & Co., having been grown on their own estates, or purchased by them, and the remainder was the produce of estates under their management.

The spices were the produce of a plantation called "Scotland," three-fourths of which belonged to Mr. George Stuart individually, as owner, and the remaining fourth to a Mr. Spicer. The three-fourths of the said plantation, with the live and dead stock thereon, belonging to Mr. Stuart, were mortgaged to Gledstanes & Co., as hereinafter mentioned. The spices from this estate forming part of the Lalla Rookh's cargo, were gathered and collected previously to the date and execution of the mortgage.

For that portion of the cargo of the Lalla Rookh which was shipped by Stuart & Co., bills of lading were made out and signed, which were all (*mutatis mutandis* as to the description of the goods) in the following form :—

\*"Shipped in good order and well conditioned, by Stuart & Co., Penang, in and upon the good ship or [\*205 vessel 'Lalla Rookh,' whereof is master for this present voyage, Haines, now lying in the harbour of Penang, and  
S. A. 110 BASKETS, bound for London, viz., 110 baskets Muscovado sugar, weighing  
6 PUNCHEONS. net 272 peculs, 8 puncheons, 800 gallons rum, 30 per cent. over proof, being marked and numbered as in the margin, and are to be delivered, in the like good order and well conditioned, at the aforesaid port of London (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of whatever nature and kind soever excepted), unto order or to assigns, paying freight for the said goods, at the rate of 5*l.* 5*s.* per ton of 20 cwt. for sugars, and per two puncheons for rum, with average accustomed. In witness whereof, I the said master of the said ship have affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Dated, in Penang, 6th April, 1848.

(Signed) "W. H. HAINES."

"Weight and contents unknown."

These bills were endorsed by Stuart & Co., and transmitted by them to Gledstanes & Co., in a letter of the 10th of April, 1848.

The remaining portions of the cargo of the "Lalla Rookh" not shipped by Stuart & Co., but, as before mentioned, by other merchants at Penang, were respectively made deliverable to order; and the bills of lading for these shipments were endorsed by the respective shippers, and transmitted to different consignees in London.

The "Lalla Rookh" sailed from Penang on the 11th of April, 1848, and arrived safely in London on the 11th \*of September, 1848. On her arrival, the plaintiffs (Gledstanes & Co.) claimed the goods [\*206 consigned or deliverable to them under the several bills of lading so endorsed to them as before mentioned, and which they held, offering at the same time to pay the freight in respect thereof according to the rates specified in the bills of lading respectively.



The defendants, however, refused to deliver the goods, or any part of them, on payment of such freight; insisting that they had a lien on all the goods shipped by Stuart & Co., and consigned to Gledstanes & Co., for so much of the 2800*l.* (being the amount of the chartered freight) as the freight to be received on the goods shipped by other parties should be insufficient to cover. This right of lien the plaintiffs deny.

The amount of freight payable in the whole upon the bills of lading, was 1909*l.* 0*s.* 6*d.*

The refusal by the defendants as above mentioned to deliver the goods to the plaintiffs, was the alleged conversion for which this action was brought.

In November, 1847, Gledstanes & Co. agreed with the said George Stuart, that they would become the agents and correspondents of Stuart & Co., and would take up the bills drawn by that firm on the said George Stuart, and then running; and, in pursuance of this arrangement, Gledstanes & Co. wrote and sent to Stuart & Co. a letter, dated the 24th of November, 1847, of which the following is a copy:—

“London, 24th November, 1847.

“Messrs. Stuart & Co., Penang.

“We have great pleasure in opening correspondence with your firm, under the circumstances and upon the terms which will be explained to you more at length by our mutual friend, and your partner, Mr. George Stuart. Time will not allow of our doing more upon this occasion than \*207] express a hope that a correspondence thus \*opened may prove satisfactory to us both: and, entertaining the high opinion we do of our friend, we rely upon his representation that you will make us large and regular shipments of produce, to our consignments; in consideration of which we are this day placing a credit in your favour with our friends Allan, Deffell, & Co., for the monthly shipments to you of 20 chests opium, commencing from the 24th of January, for the cost of which they will reimburse themselves by drawing upon us on your account. We also agree to your drawing upon us direct for the amount you may have occasion to pass upon us for remittance to the various parties in this country who we understand are shippers to your consignment.

(Signed) “GLEDSTANES & Co.”

On the 7th of February, 1848, Stuart & Co. replied to this communication, in a letter from which the following is an extract of so much as is material to this case:—

“Penang, 7th February, 1848.

“Messrs. Gledstanes & Co., London.

“By the January mail, we had the pleasure to receive your esteemed favour of the 24th November, advising an arrangement you had made with our senior, Mr. George Stuart, for the management of our business in London, which we are happy to confirm, and trust it will be mutually satisfactory.

"The months of October, November, and part of December, are our rainy season, during which our sugar operations are necessarily limited; and our shipments of this article lately have not therefore been quite so large: but you may rest assured of our ability to make good the representations made by Mr. Stuart, of which he has made us acquainted; while, at the same time, we shall have ere long the produce of the Golden Grove, Saing Leong, and Krean estates, and, at the end of the year, that also of the Taggile estate, now shipped by one \*of our neighbours. We shall, in fact, with the same expenditure, have nearly [\*208 double the quantity of produce. We observe, that, on the faith of our making constant shipments of our produce, you have authorized us to draw on you for remittances we may require to make to our consigning friends in England, and that you had established a credit with your friends Allan, Deffell, & Co., for the monthly shipment to us of twenty chests of opium; all of which is satisfactory.

(Signed) "STUART & Co."

In the mean time, on the 28th of January, 1848, Gledstanes & Co. wrote and sent to Stuart & Co. a letter of which the following is a copy:—

"London, January 28, 1848.

"Messrs. Stuart & Co., Penang.

"We had this pleasure on the 18th ult., and we have now to announce to you the departure of the 'Success,' which vessel, as Mr. Stuart may probably have advised you, has been chartered by him to load home from Penang. We gave you memorandum of sale of your sundry consignments to hand at our last sale, and since that time nothing additional has reached us. In the interval that has elapsed, we have made up account-sales,—the results of which are so ruinous that we find ourselves most unexpectedly brought under a very serious advance. When taking his position, as represented by Mr. Stuart, we did not anticipate being inconvenienced at all; he having valued his available securities, when he opened account, at such a rate as would have kept us free from cash outlay. Under these circumstances, we naturally feel considerable anxiety; and it has been with extreme pain that we have pressed upon our friend the necessity of his suspending operations through your Glasgow connexions for the present, as well as that he should give us some approved security to cover our claim, which \*(estimating your [\*209 future remittances by those we have already received, and even allowing for some improvement in value) will, in the course of three or four months, reach some most unmanageable amount. We regret to say Mr. Stuart's precarious state of health renders our difficulty the greater; for, we are naturally averse to trouble him with our gloomy views of the position and prospects of the account, which, judging by the operations of last mail, can only get worse and worse; for, it is quite clear that the 20,000*l.* of invoices you then sent per Minerva will not nearly cover

the bills you drew at the same time. We rely much upon what you may be doing meanwhile; for, Mr. Stuart assures us that he laid his position before you in September and October, and called loudly upon you for aid, for otherwise he cannot give us security for what we have already done; and there will be no alternative for us, however painful to us such a course would undoubtedly be, but to bring our connexion with your firm,—to which, judging by his representations, we looked forward with such lively satisfaction,—to an abrupt termination; under which lamentable probability, you will of course abstain from drawing one farthing upon us until you hear further, and more favourably from us.

(Signed) "GLEDSTANES & Co."

On the 8th of March, Stuart & Co. replied to the above, by a letter, of which the following is a copy:—

"Penang, 8th March, 1848.

"Messrs. Gledstanes & Co.

"We have to-day, by the arrival of the mail, been put in possession of your favour of the 22d of January, and regret to find that the present state of the sugar market, and the position of our accounts with you, have induced you to withdraw in some measure the confidence you seem \*210] inclined to repose in us. We observe \*by this letter also, that you do not wish us to draw upon you; but, as that would compel us to withhold a part of the shipping documents of the cargo per British Isle, we have thought proper in this instance, particularly as the amount is small, to allow our advices to go forward as they are, trusting that, before this reaches you, circumstances may have occurred to place our affairs with you in a more favourable point of view. We must admit that the balance against us is a heavy one, and that we had, with the view of perfecting our sugar estates, been induced to draw more heavily than we would have done, could we have suspected even that such a crisis was at hand; but we must beg leave to state, at the same time, that these estates are consequently so much more valuable; and we know, moreover, that we can produce good Muscovado sugar, the quality of which is daily improving, at \$2½ per pecul, and rum 33½ over proof, at 25 cents per gallon,—prices lower even than those now ruling in London, low as they now are. We find, in fact, that the estates now in operation (making sugar) will pay the expenses of all the others now in progress, even at the present low price. And, in how much better position will we be in a few months hence, when these other estates are making sugar also! We are aware of the prejudice that now exists against sugar estates; and, in what we have stated, we have taken the most gloomy view of the matter. We cannot but think that the price of sugar must improve,—which seems to be the opinion of every one acquainted with the cost of production in the island of Mauritius, Bengal, and throughout the world generally: and it would have been better, we think, had you waited another month or two, before taking steps which cannot but be highly

injurious to our interests with our consigning friends in Great Britain, and lead to much inconvenience here. We have no doubt but that our Mr. Stuart will be inclined to \*meet your wishes in regard to giving security, so far at least as lies in his power: but, surely, now [\*211 that we have seen the worst of the most extraordinary crisis that ever shook the commercial world, there is no occasion for resorting to such extremities. Our debt to you now will, we think, with all our drafts to this date, be about . . . . . £50,000 0 0

"To meet which, you have our policies on the Samuel Smith to the extent of, say, . . . . . 18,000 0 0

"And our shipments per Bowes of Stretham, Minerva, Gwalior, and British Isle, will, we are sure, give . . . . . 22,000 0 0=40,000 0 0

"Leaving our debt to you, supposing you make no further advances, about . . . . . £10,000 0 0."

By an indenture dated the 11th of March, 1848, made between the said George Stuart of the one part, and the individuals composing the firm of Gledstanes & Co. of the other part,—after reciting that the said George Stuart was seised of three-fourths of the said Scotland plantation, free from encumbrances except a mortgage thereafter mentioned, and also of three-fourths of the cattle, plantation implements and utensils, and other live and dead stock thereon; and that Gledstanes & Co. had made divers advances of money, and had become under liability for the said George Stuart and the said firm of Stuart & Co., by drawing, accepting, or endorsing bills of exchange on his or their account, and by guarantying to the said Messrs. Allan, Deffell, & Co., and other persons, payment of moneys and advances in goods or bills made \*or to be made for or on account of the said George Stuart or the said [\*212 firm of Stuart & Co.; and that it was probable that the said George Stuart, or the said firm of Stuart & Co., or both of them, might become liable to the said Gledstanes & Co.; and in order to secure the money which should from time to time become due from the said George Stuart, or the said firm of Stuart & Co., on balance of account, or by any ways or means whatsoever, the said George Stuart had agreed to execute to Gledstanes & Co. a mortgage of his said shares of the said plantation, estate, effects, and premises, in manner, and with the powers and authorities thereafter expressed,—it was witnessed, that the said George Stuart did grant, release, and assign unto the said Gledstanes & Co. his three-fourths of the said plantation; and also three undivided fourth parts of and in the cattle, live and dead stock, implements, and utensils whatsoever in and upon the said plantation or estate, or any part or parts thereof, To hold the same, subject to redemption on payment of all

moneys due or to become due by George Stuart, or Stuart & Co., to Gledstanes & Co.

Previously to the 8th of March and the shipments by the *Lalla Rookh* as aforesaid, in pursuance of and in accordance with the agreement entered into between the plaintiffs and the said George Stuart, as shown in the correspondence hereinbefore set forth, Stuart & Co. had shipped produce from Penang to Gledstanes & Co., and Gledstanes & Co. had taken up bills drawn by Stuart & Co., either against the produce so shipped, or on the general account of Stuart & Co., on the faith of expected consignments.

Gledstanes & Co. had also, previously to the shipments by the *Lalla Rookh*, sold or disposed of, as well the consignments made by Stuart & Co. to the said George Stuart, and by him handed over to them, as \*213] those subsequently received by them directly from Stuart & Co.; \*but the sales had realized less than the aggregate amount of the drafts of Stuart & Co. paid by Gledstanes & Co. on their account under the agreement or arrangement before mentioned; and, at the time of the shipments by the *Lalla Rookh*, Stuart & Co. were, and had continued from thence to be, and still were, indebted to Gledstanes & Co. in a sum amounting to at least 10,000*l*.

The question for the opinion of the court is,—whether Gledstanes & Co., the plaintiffs, were entitled to the delivery of the goods shipped by Stuart & Co., and consigned to them as aforesaid, on payment of the freight for such goods according to the rates specified in the bills of lading respectively.

If the court should be of opinion that they were so entitled, then the defendants were to withdraw their pleas, and final judgment was to be entered up for the plaintiffs for 1*s*. damages, and 40*s*. costs. If the court should be of opinion that the plaintiffs were not so entitled, then a *nolle prosequi* was to be entered by the plaintiffs.

*Channell*, Serjt. (with whom was *Montague Smith*), for the plaintiffs.(a)—Admitting that the plaintiffs, claiming title to the goods under Stuart & Co., the shippers, could only take them subject to the charges thereon for which Stuart & Co. were liable, the question is, \*214] \*whether they are subject to a lien beyond the freight stipulated for by the bills of lading. No fraud was committed upon the shipowners, as in *Grant v. Norway*, 10 C. B. 665, where bills of lading were signed for goods not shipped: here the bills of lading were properly signed by the master, pursuant to the authority he had.

(a) The points marked for argument on the part of the plaintiffs were,—“That the defendants, as owners of the *Lalla Rookh*, had no right of lien upon the goods specified in the bills of lading, except for the freight therein also specified: that the bills of lading contained no reference to the charter-party, and were an engagement to deliver the goods on payment of a specific rate of freight: that, by the special terms of the charter-party, the defendants had not the right of lien, even against the charterers: and that, even if such lien could have attached upon goods the property of Stuart & Co., yet, the goods being, as appears upon the case, the property of the plaintiffs, no such right could avail against them.”

[JERVIS, C. J.—The master had a qualified authority: he was bound to cover the whole amount of freight stipulated for in the charter-party. CRESSWELL, J.—No doubt, the owners looked to a lien upon some portion of the cargo for the chartered freight.] For any portion of the chartered freight not covered by the bills of lading, they must be taken to have intended to trust to the personal security of the shippers. The case in many respects resembles that of *Small v. Moates*, 2 M. & Scott, 674, 9 Bingh. 574. But there the owner by the charter-party expressly reserved to himself a full and complete lien upon the loading of the ship for the entire freight. Here, the effect of the contract is, to reserve the owners' remedy against the charterers,—a discretion being given to the master to sign bills of lading at any rate of freight, without prejudice to the charter-party. [JERVIS, C. J.—The master, in signing bills of lading, is the agent of the charterers, with the consent of the owners, who authorize him to sign them so as not to prejudice their claim for the lump freight.] In some sense the master is, no doubt, agent for both. The case states that *Stuart & Co.* were not the shippers of the entire cargo. [JERVIS, C. J.—I incline to think the intention of the parties was, that no bills of lading should be signed at all for the charterers' goods.] The intention evidently was, to give the charterers every facility in parting with their goods: and that is the most natural construction. If the distribution of the freight left any part of the 2800*l.* uncovered, the owners rely upon the solvency of the charterers for that. Suppose *Gledstones & Co.* had sold the bills of \*lading? [\*215 [CRESSWELL, J.—That possibly might give rise to a different question, assuming that the bills of lading were transferred *bonâ fide* to a consignee without notice.] In *Mitchell v. Scaife*, 4 Campb. 298, the ship was chartered for a particular voyage for a gross sum by way of freight: the captain signed bills of lading for the cargo, which was the property of and consigned to a third person, specifying a rate of freight amounting to a less sum than that mentioned in the charter-party: and Lord Ellenborough said: "Upon the facts proved, I am of opinion that the shipowner had no right to detain the cargo for more than the freight mentioned in the bill of lading. The plaintiff is the *bonâ fide* endorsee of the bill of lading, and, having paid the bills of exchange, must be taken to be the purchaser and owner of the cargo. He is in no degree connected with any fraud upon the charter-party. He receives the bill of lading, by which the master agrees that the goods shall be delivered to him on payment of a certain specified freight. He knew that this is an instrument which the master has in general authority to sign, and he seems to have had no reason to suspect that this authority was not properly exercised upon that occasion. Under such circumstances, I am of opinion that the owner of the ship cannot be heard to aver against the contract created by his own agent through the medium of the bill of lading."

*Lush* (with whom was *Byles*, Serjt.), contra. (a)—Small \*v. \*216] *Moates* is decisive of this question. The charter-party there was substantially the same as that in this case; the owners, in both, expressly reserving their lien upon the whole cargo for the chartered freight. [CRESSWELL, J.—The stipulated freight in *Small v. Moates*, was so much per ton per month: the master had no authority to sign bills of lading otherwise.] The stipulation as to the master's signing bills of lading here, without prejudice to the charter-party, was inserted for this reason. The charter-party was made by George Stuart, in London: it was at that time uncertain whether his firm at Penang would have goods enough of their own to fill the ship. This stipulation, therefore, was introduced with reference to goods belonging to third persons which might be put on board to complete the cargo. Tindal, C. J., in delivering the judgment of the court in *Small v. Moates*, says, —2 M. & Scott, 696,—“From the moment these articles were loaded on board, the lien of the defendant (the shipowner) attached upon them for the freight and other payments due to him, under the express contract contained in the charter-party. If the master had sold this cargo of rice and saltpetre to a third person, but still retained it in his possession on board the ship, to be carried to London, it is difficult to state the principle upon which this lien, once vested in the shipowner, \*217] should have become divested from him by \*such sale. Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for those particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold before delivery to a stranger: or, in other words, the shipowner's lien remains unaltered, whether the bill of lading is endorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And, upon the same principle, it would seem to follow, that, if the lading in the ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charter-

(a) The points marked for argument on the part of the defendants, were,—

“That they, as owners of the ship, not having demised the vessel herself, were entitled to a lien on the whole cargo shipped by her, for payment of the freight specified in the charter-party:

“That, although, as between Stuart & Co. and the plaintiffs, the endorsement of the bills of lading for value might give the latter the right to have the goods at the rate of freight specified in the bills of lading, yet this could not affect the right of the shipowner to his lien for the chartered freight, and would have the effect only of giving a right of action to the plaintiffs against Stuart & Co. for the excess over the freight specified in the bills of lading, which they had so been compelled to pay:

“That, on the statement of the case, it appears that Stuart & Co. were, at the time of shipment, substantially the owners of all the cargo shipped in their names, and consequently that, as against them, under all the circumstances, the right of lien was available:

“And that, as between Stuart & Co. and the plaintiffs, the bills of lading were signed without prejudice to the charter-party.”

party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser subject to the lien which the shipowner had before the sale." [JERVIS, C. J.—If I put goods on board, and the master signs bills of lading for them "freight paid," would the owner's lien for freight attach upon them in the hands of a *bonâ fide* assignee for value, without notice?] The judgment in *Small v. Moates* goes to the extent of holding that it would, if the goods were the property of the charterer. [JERVIS, C. J.—The point arose, and was expressly decided, in *Howard v. Tucker*, 1 B. & Ad. 712 (E. C. L. R. vol. 20). At the conclusion of the judgment, Tindal, C. J., says: "Whatever may be the hardship on either party, this case is to be determined by reference to their strict legal rights; and, as it appears to us that the title of the defendant as shipowner to a lien on these goods, is prior in point of time to that of the plaintiffs as endorsees of the bills of lading for the purpose of securing advances made to the master, we think the defendant's lien is to be preferred to the plaintiff's title under the endorsement." [JERVIS, C. J.—\*The intention no doubt was, that the bills of lading should be so signed as [\*218 to give the owners a complete lien for the entire freight.] No doubt. There is far less hardship here than in *Small v. Moates*. There, the plaintiffs had made advances upon the particular goods: here, the plaintiffs were already in advance at the time of the shipment; they were creditors of *Stuart & Co.* The charterers, in any view, knew they were violating the contract which they had entered into. [CRESSWELL, J.—It was impossible to carry out the stipulation as to the signing of bills of lading, consistently with the rest of the charter-party.] The charterers had no right to insist upon the captain's taking on board goods belonging to third persons, unless they could carry out the stipulations they had entered into.

*Channell*, Serjt., in reply.—The goods in question were consigned by the charterers to the plaintiffs, with instructions to sell, and to repay themselves the advances they had come under, not, indeed, in respect of the particular consignment, but under the contract set out in the case. Consistently with that, the bills of lading are perfectly valid documents. It never was intended that the owner's lien should attach upon each parcel of goods shipped, to the full extent of the lump freight. The very object of enabling the master to sign bills of lading at *any* rate of freight, was, to enable the consignors the more readily to dispose of the goods. In *Small v. Moates*, the bills of lading were signed for an amount inconsistent with the charter-party. The shipper knew that the master was acting without the scope of his authority. This case is clearly distinguishable from all those where the bill of lading has been held to be a fraud upon the owners. The provision here, that, "in the event of a less freight, the bills of lading of part of the cargo



\*219] were to be filled up for loss, if any," plainly indicates the \*intention of the contracting parties. It contemplates that the master may properly sign bills of lading for a rate of freight which would not afford a reasonable indemnity for the full amount of the lump freight. In Abbott on Shipping, 8th edit. p. 333, it is said, that, "where bills of lading to *shipper's order*, or to ——— or *order*, *endorsed*, or by which goods are made deliverable to a consignee by name, are transmitted to him as security for antecedent advances, or to indemnify him against liabilities in respect of the particular consignment which they represent, they are evidence of such a destination and appropriation to him of the specific goods, as will vest in him a property, absolute or special, in them at the time of their delivery on board, and so render the master responsible to him for their loss or injury:" Walley v. Montgomerie, 3 East, 585. This is a distinct authority to show that the plaintiffs in this case were sufficiently endorsees for value to entitle them to claim the delivery of the goods in question upon payment of the specific freight.

JERVIS, C. J.—I am of opinion that the defendants in this case are entitled to the judgment of the court. If it were necessary or could be useful to enter upon a discussion of the various questions which might arise upon the facts presented in this special case, I should have desired time for deliberation. But, in the view I take, it is not necessary, seeing that we may shortly dispose of the matter by considering, first, in what relation the plaintiffs stood with regard to Stuart & Co., the charterers; secondly, in what relation Stuart & Co. stood towards the shipowners. It seems, that, by arrangement between the plaintiffs and Stuart & Co., of Penang, the latter were to draw upon the plaintiff's house in London, Stuart & Co. in return consigning to the \*220] plaintiffs the produce of certain estates of the former in \*Penang, for sale by the plaintiffs on account of Stuart & Co.,—the proceeds of such sales to be set off against the bills so drawn, so that the general consignments should cover the advances from time to time to be made. There is nothing whatever to liken it to the case of an endorsee for value, who, according to Howard v. Tucker, 1 B. & Ad. 712 (E. C. L. R. vol. 20), would be in a better position than the shipper or the charterer. The relation of the parties was in no respect altered by anything that passed upon the shipment of the goods. If, before the goods were put on board, Stuart & Co. had borrowed money upon them, they would clearly have come to the plaintiffs' hands subject to that charge. It seems to me, therefore, that the plaintiffs are in precisely the same situation as the charterers at the time of shipment. So long as the goods remain the property of the charterers, or of their agents, they are liable to the lump freight. And I do not think the clause at the end of the charter-party, authorizing the master "to sign bills of lading at any rate of freight, without prejudice to this charter-party,"

makes any difference. No ordinary shipper would have put goods on board upon such a charter-party as this. The charterers, therefore, say,—“Give the master authority to sign bills of lading at a specified rate of freight;” to which the owners assent, provided it is not to prejudice their rights under the charter-party. The master accordingly gives bills of lading. I do not say that the owners might not have been bound to deliver the goods to a *bonâ fide* holder for value of the bills of lading, upon payment of the freight therein mentioned. But, here the plaintiffs do not stand in that position: and they must be taken to have been cognisant of the limited authority of the master. Upon these short grounds, I am of opinion that this case is to be determined by the authority of *Small v. Moates*, 9 Bingh. 574 (E. C. L. R. vol. 28), 2 M. & Scott, 674, which is express upon that point, and \*pro- [\*221  
ceeded upon principles which are precisely applicable to the pre-  
sent case.

CRESSWELL, J.—I am of the same opinion. I find it extremely difficult to put any sensible construction upon the last clause in the charter-party. I am unable to discover what was the intention of the parties. It is clear, however, that they intended one thing,—that the charter should sustain no prejudice from the master’s signing bills of lading at rates of freight to be agreed on between him and the charterers. I should rather suppose it was contemplated that the captain should sign bills of lading for goods put on board by general shippers, and not for the charterers’ own goods. In any event, I think the charterers’ putting their own goods on board, and getting the master to sign bills of lading for them, could not affect the rights of the owners under their contract for the lump freight. They would have a right to detain them till the whole freight was paid. That being so, are the plaintiffs in any better position, as assignees of the bills of lading, than the charterers were? Their position seems from the special case to be this,—they have entered into an agreement with Stuart & Co. to make advances upon the faith of future consignments: they stand, therefore, in the relation of consignees and factors for sale. No specific advances appear to have been made upon the particular goods: the plaintiffs were under advances generally, and were to receive the goods to sell on account of Stuart & Co., and to account for the proceeds, subject to their lien for the advances. What more could they take than the charterers themselves? According to the case of *Small v. Moates*,—in which I entirely concur,—it is difficult to see how the lien which the owners clearly had at the time of the shipment could be discharged. It could only be so by the application of the doctrine of *Howard v. Tucker*: there, goods being shipped in India for London, on account of a person there, the \*bill of lading was forwarded to him, and *he endorsed it over for* [\*222  
*value*: the bill of lading signed by the captain stated the freight to  
have been paid in Bengal; but it was found, after the above transfer, that

the freight never had been paid, through default of the shipper: and it was held that the shipowners could not detain the goods until payment of the freight by the assignees of the bill of lading. No question of lien arose directly in that case: but the brokers employed by the assignees of the bill of lading having sold the goods, and paid the freight over again, in order to obtain possession of them, Lord Tenterden ruled that the brokers could not treat the money so paid as money paid on account of their principals, because the shipowner was estopped by the act of his captain, from claiming a lien upon the goods, as against an endorsee for value, for freight which he had led them to suppose had been paid in Bengal. So, here, if the plaintiffs had been endorsees for value of these bills of lading, the shipowners might possibly have been estopped from claiming a lien on the goods beyond the stipulated rate of freight. But there are no facts stated in this case to raise that point. The plaintiffs clearly are not entitled to recover.

WILLIAMS, J.—I am of the same opinion. In the course of the argument I felt some doubt whether the special clause at the end of the charter-party did not render the bills of lading so authorized to be signed by the master a distinct matter, so as to limit the owners' lien to the specified freight. But I now think that the construction put upon the charter-party by the Lord Chief Justice and my Brother Cresswell, is the correct one. As to the other question, I can entertain no doubt whatever.

TALFOURD, J., concurred.

Judgment for the defendants.

**\*228] \*In the Matter of THOMAS HAKEWILL. May 5.**

The father is by law entitled to the custody of his legitimate children: and, *semble* that a court of common law has no jurisdiction, under any circumstances, to deprive him of that right. The court will receive the return to a writ of habeas corpus, although the party called upon to make it is not present.

Service of the writ, by leaving it with "the brother and agent" of the party called upon, at his place of abode,—Held, sufficient.

A JUDGE'S order for a writ of habeas corpus cum causa, directed to Thomas Hakewill, commanding him to bring up the bodies of Thomas Hakewill, Mary Fanny Hakewill, Jane Hakewill, Joseph William Hakewill, George James Hakewill, and James Ridgway Hakewill, was obtained, at the instance of Elizabeth Hakewill, the wife of the first-named Thomas Hakewill, returnable in this court.

The application was supported upon the affidavit of Elizabeth Hakewill, which stated, that, on the 27th of October last, the said Thomas Hakewill forcibly turned the deponent and her five infant children out of his residence into the street, and did not from thence until the 3d of April last allow her any money whatever for the support of herself

or the said five children; that, on the said 3d of April, the said Thomas Hakewill, together with one James Baker, fraudulently and clandestinely removed and decoyed the said five children from her custody, and still did detain the said children, the youngest whereof was an infant of two years of age, and the eldest an infant of eight years of age only; and that the deponent verily believed that the said Thomas Hakewill was about to depart this realm immediately for France, he having on Saturday night last told the deponent he intended to do so.

Cooke, on the part of Thomas Hakewill, objected that there had been no due service of the writ,—the affidavit of service merely stating that the writ had been served by leaving it with “Henry Philip Hakewill, the brother \*and agent of the said Thomas Hakewill,” at the residence of the said Thomas Hakewill, No. 38, Harrington Square, in the county of Middlesex: whereas, the statute 56 G. 3, c. 100, s. 2, requires the service to be *personal*, or by leaving the writ “at the place where the party shall be confined or restrained, with any servant or agent, of the person so confining or restraining,” &c. [JERVIS, C. J.—By whom are you instructed?] By the husband. [JERVIS, C. J.—Then you have sufficient notice of the writ.]

The writ and return were then read by one of the masters. The return was as follows:—

“I, Thomas Hakewill, in obedience to the writ hereunto annexed, do hereby humbly state, that I was married in the year 1839, to Elizabeth Hakewill; that I have by the said marriage seven children now living, of the respective ages following, that is to say, Elizabeth, between twelve and thirteen years of age, Thomas, between eleven and twelve years, Mary Fanny, between eight and nine years, Jane, between seven and eight years, Joseph William, between six and seven years, George John, between four and five years, and James Ridgway, between two and three years; that Elizabeth is now at school at Boulogne, placed there by me for her education; that I am secretary to the Hampstead Water-works Company, having an official residence at the office of the company, No. 38, Harrington Square; that a part of the said house has been and is occupied by my mother; that, from the year 1849 up to the present time, feelings of estrangement have existed, and do still exist, between myself and my said wife, arising on my part from a belief of the ill-treatment, misconduct, and neglect on the part of my said wife towards my said children, and also from her jealousy and violence of manner and intemperance of language and conduct [\*225 \*towards myself, and, further, that the aforesaid conduct was exhibited in the presence and hearing of the said children, to their injury and contamination; that at no time whatever were the said children and my said wife, or any or either of them, turned out of my residence into the streets, or deprived of support, as stated in the affidavit of my said wife, sworn on, &c., and filed in this court; that the

last-mentioned charge in the said affidavit, as far as I am able to explain and account for the same, arose in the following way,—that, on Monday, the 27th of October last, my said wife, who had been up to that time residing, with five of the said children, at Boulogne aforesaid, and were provided for there by me, and where arrangements had been made by my said wife, with my consent, for a lengthened residence, unexpectedly, and without notice to me, came to my official residence at the office of the said company, and that I being unable to provide proper accommodation for them at the said office, requested my said wife and children to go to reside at Hawley Cottage, a place prepared for their reception, and which was convenient and suitable to them then to inhabit; that there was on that occasion great violence used and exhibited by my said wife in the presence of the said children; that my said wife and the said children went to the said cottage, and that from that time the children were by my said wife kept and concealed from myself, and that I was prevented by such concealment from exercising due authority and control over them; that the said children were removed to and from various houses, that is to say from Hawley Cottage to Bagham Terrace, and from thence to Willesden, where they remained five weeks, and during which time I have reason to know that my said wife visited the said children only twice; that the said children were thence removed to Milton Street, and from thence to Queen's Road, Bayswater, to \*Cobourg Place, to Bayswater Terrace, and to Gold-  
\*226] hawk Terrace; that, from the resident owners of each of the said houses in which the said children were from time to time staying as aforesaid, I received information of ill-treatment and bad conduct on the part of my said wife towards the said children; that, during the time of their said concealment, I made repeated applications, through the brother of my said wife and other persons, to her, and requested that some arrangement might be come to for the better maintenance of the said children; that, finding my said wife was averse to and refused to enter into any such arrangement, I provided and arranged that the said six children should be placed under the care of a confidential nurse, who had been in charge of the said children for about two years, and to whom they were much attached, and for that purpose I provided for them a residence in the island of Jersey, suitable to their position and station in life; that five of the said children are now being educated by suitable, proper, and competent persons in that behalf, and that all care and attention to their bodily and mental wants is provided for them; that such of the said children as are of sufficient age to form a judgment, are anxious and willing to remain under such care, and are unwilling to return to my said wife, and that I felt it a duty to provide for them in this way, in order to avoid the contamination and negligent and improper treatment which I believe would have arisen from their residence with my said wife; that Thomas, one of the said six children,

when placed at school at Exeter, was removed by my said wife from the said school, and became subject to great privation and neglect; that the said children were taken and removed by me to Jersey as aforesaid on the 3d of April last, and that they were not so taken and removed in consequence or in anticipation of any writ of habeas corpus, or any other proceedings at law respecting them, or for the \*purpose [227 of removing them from the jurisdiction of this court, or of any other court of law or equity, but solely for the protection and advantage of the said children, as hereinbefore mentioned: and I believe and submit, that, in addition to the reasons hereinbefore contained, I have, as the father of the said children, a lawful right to the custody of them."

*Kenealey*, for Mrs. Hakewill, objected to the court's dealing with the return, without the husband's being present, without an affidavit verifying it, and without opportunity being given to inquire into the truth of the matters therein alleged. He referred to the 3d section of the 56 G. 3, c. 100, which enacts, "that in all cases provided for by this act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in the return, by affidavit, &c., and to do therein as to justice shall appertain; and, if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return, or any of them, be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the person so confined or restrained, upon his or her entering into a recognisance, in a reasonable sum, to appear in the court of which the said justice or baron shall be a justice or baron, upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return, together with such recognisance, affidavits, &c.; and thereupon it shall be lawful for the said court to proceed to examine into the truth \*of the facts set forth in the return, in a summary [228 way, by affidavit, &c., and to order and determine touching the discharging, bailing, or remanding the party." [JERVIS, C. J.—Upon inquiry, I find it is not necessary for the party to appear. And the case of *Leonard Watson and others* (the Canadian prisoners), 9 Ad. & E. 731 (E. C. L. R. vol. 36), (a) seems to show that the return must be taken to be true, and need not be verified by affidavit. It was doubted in that case whether there be any mode (other than by action) of impeaching the truth of such return, or of introducing new matter. I must confess I should have thought that it was competent to the party

(a) Per nom., *The Queen v. Batchelder*, 1 P. & D. 516.

at whose suit the writ is obtained, to impeach the return upon affidavit, or to traverse it and go to a jury, or to argue upon the return that it does not justify the detention.] Then, the return is clearly insufficient upon the face of it. [JERVIS, C. J.—Have we any authority to interfere to remove the children out of the custody of the father?] There are many cases where courts of law have so interposed; the right of the father seems to be limited to the custody of his heir apparent: *Rex v. Smith*, 2 Str. 982. Lord Mansfield goes very fully into the question in the case of *The King v. Sir Francis Blake Delaval*, 3 Burr. 1434, 1 Sir W. Bl. 410, 489. After citing *Rex v. Clarkson*, 1 Str. 444, *Rex v. Johnson*, 1 Str. 579, and *Rex v. Smith*, 2 Str. 982, his lordship said,—“He thought that what was *done* by the court in every one of them was right; though he did not agree with the *sayings* that were reported in the books to have been made use of in determining them. In cases of writs of habeas corpus directed to private persons, ‘to bring up infants,’ the court is bound *ex debito justitiæ* to set the infant free from an improper restraint: but they are not bound to deliver them \*229] over to anybody, nor to give them any \*privilege. This must be left to their discretion, according to the circumstances that shall appear before them. There is a privilege redeundo, unless the court should see ground to declare the contrary. In the three particular cases which he had mentioned, all that was *actually done*, he said, was *right*; though he did not agree with all that was *said*. In the first of these cases,—*Rex v. Clarkson*,—the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife: she denied the marriage. The court could not try the marriage by affidavit: and they could not deliver her to the man *as her husband*, without allowing the marriage. She chose to remain with her guardian: and the court, upon being informed that the man had a design to seize her, sent a tipstaff home with her to protect her. In the second case,—*Rex v. Johnson*,—the child was *too young* to judge for itself: she was not more than nine or ten, or, as some accounts say, *six* years old; but certainly *not* old enough to exercise any judgment of her own. And there was a *legal guardian* appointed by the will of her father: and therefore it was right to let the legal guardian take her, as she was *too young to judge for herself*. The guardian appointed in that case by the spiritual court was nothing at all; for, they appoint anybody guardian in that court, for the mere purpose of appearing. In the third case,—*Rex v. Smith*,—the child wanted but six weeks of fourteen: and that case was determined right (barring the dicta that were used in it); for, the court were certainly right in refusing to deliver the infant to the father, of whose design in applying for the custody of his child they had a bad opinion. The true rule is, that the court are to judge upon the circumstances of the particular case, and to give their directions accordingly.” That case clearly shows that it was never doubted

that a court of common law has jurisdiction to entertain questions of this sort. In *Rex v. Moseley*, \*5 East, 224, n., and *Rex v. Hopkins*, 7 East, 579, also, the Court of Queen's Bench, upon habeas corpus, removed children from the custody of the father and restored them to the mother; Lord Kenyon, in the first case, saying,—“When the father has the custody of the child fairly, I do not know that this court would take it away from him; though I do not mean to impeach the propriety of the case cited,—*Rex v. Soper*, 5 T. R. 278. But, where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before.” [TALFOURD, J.—Both these were cases of illegitimate children; and, in the former, the child was within the age of nurture.(a) Can you produce any scintilla of authority to show that a court of law has authority to remove *legitimate* children from their father's custody, under any circumstances? I never heard it suggested. In *Wellesley v. The Duke of Beaufort*, 2 Russ. 1,(b) Lord Eldon puts it upon the higher ground,—the right of the chancellor, as representing the crown as *parens patriæ*.(c)] One of the grounds upon which that case was rested, was, that the separation commenced with the father's consent,—a circumstance which also occurs in the present case. It is perfectly competent to the court to inquire and to \*determine whether the conduct of the parties does not render one more fit and proper to have the custody of the children than the other. And the fact that the children have been removed beyond the jurisdiction of the court is by no means to be lost sight of. [\*230 [\*231]

*Cooke* was not called upon to support the return.

JERVIS, C. J.—I am of opinion that the return to this writ of habeas corpus is sufficient. Mr. Kenealey has insisted that the return is insufficient; but he has produced no affidavits to impeach its validity. The substance of the return is,—“I am the father of these six children, and the court has no jurisdiction to deprive me of the custody of them.” Of legitimate children, the father has the undoubted right of custody. It is otherwise with regard to illegitimate children. That right, however, is subject to the controlling power of the crown as *parens patriæ*. The lord chancellor may under certain circumstances remove children from the custody and care of their father, and place

(a) See *In re Anne Lloyd*, 4 Scott, N. R. 200, 3 M. & G. 547 (E. C. L. R. vol. 42). There the mother of an illegitimate child between eleven and twelve years of age, obtained a writ of habeas corpus to compel the putative father to bring her before this court. The child being brought up, the court declared her entitled to exercise her own discretion as to whether she would go, and would not allow the mother to take her against her will.

(b) Affirmed on appeal in the House of Lords,—*Wellealey v. Wellealey*, 2 Bligh, N. S. 124, 1 Dow, N. S. 154.

(c) Lord Eldon in that case expressly bases the interference of the court upon the circumstance of the infant possessing property,—cautiously disclaiming for it the jurisdiction to protect those whose poverty renders them objects of no interest in a court of equity.



them elsewhere. But we, sitting as a court of law, clearly have no such power. Even if we *had* power to inquire into the conduct of the father, with a view to remove the children from the contamination of bad example, no such circumstances are disclosed in this case as would have warranted our interference. The return must be allowed.

CRESSWELL, J.—I am entirely of the same opinion. The point was expressly determined in this court in *Ex parte Skinner*, 9 J. B. Moore, 278 (E. C. L. R. vol. 17). So, in *The King v. Greenhill*, 6 N. & M. 244 (E. C. L. R. vol. 36), it was held by the Court of Queen's Bench, that the father is entitled to the custody of his children, to the exclusion of their mother, although they be within the age of nurture; and that, where a child is in the custody of the mother, the court will \*compel her to deliver it into the custody \*232] of the father, unless it appear to the court that the child will be improperly restrained, or its morals contaminated by being placed in the father's custody. "The custody of the father," says Lord Denman, "is the proper legal custody. Where there is danger to the infant in intrusting it to the care of the father, the court will not act upon the jurisdiction which they possess. Therefore, if there were well-founded apprehensions of the father's acting with extreme harshness or cruelty, or with gross profligacy or immoral conduct, so that the child would be in danger of contamination, the court would not order the child to be delivered to him." And Littledale, J., said: "Upon general principles of law, the father is entitled to the custody of the children. If they be of an age to judge for themselves, they have a right to determine where they will go: but, if they be not, it is the bounden duty of the court to put them in that custody which the law points out. Supposing the children were in the custody of a third person, and the question was, whether the father or the mother should be intrusted with them—there could be no doubt that the court would order them to be delivered to the custody of the father, and any application of the mother would not be attended to." If these children were of an age to judge for themselves, we might compel their production. But this application does not embrace the only one of these children who is of such age: it is not suggested that she is in any improper custody. As to the other children, I think the cases abundantly show that the primary right of custody of children is in their father. I do not remember any case where a court of common law has interfered in any way with that right. Nor is there any dictum that I am aware of which goes to any such extent. The case of illegitimate children obviously stands upon a totally different footing.

\*233] WILLIAMS, J.—I am of the same opinion. By law, the father has an undoubted right to the custody of his children. It is by no means clear that a court of law has power under any circumstances

to control or interfere with that right. But, at all events, no case for interference is made out upon the present occasion.

TALFOURD, J., concurred.

Return allowed.

That the father is entitled to the custody of his infant children, see *Matter of Kottman*, 2 Hill, S. C. 363; *Commonwealth v. Addicks*, 2 Serg. & Rawle, 174; *The People v. Mercier*, 3 Hill, 399; *The State v. Paine*, 4 Humph. 523; *Steele v. Thacher*, Ware, 91.

But that the Court on a habeas corpus will

exercise a discretionary power as to the custody, see *Commonwealth v. Nutt*, 1 Browne, 143; *U. States v. Green*, 3 Mason, 482; *State v. Smith*, 6 Greenl. 462; *The People v. Chagaray*, 18 Wend. 637; *Mercier v. The People*, 25 Wend. 64; *Wood v. Wood*, 3 Ala. 756.

### HAYES v. KEENE. April 29.

A defendant arrested under a warrant of commitment of a county court within three months from the day of its date, may lawfully be detained under such arrest after the expiration of the three months,—notwithstanding the 131st rule made under the authority of the 12 & 13 Vict. c. 101, s. 12, which provides that “warrants of commitment whenever issued, shall bear date on the day on which the order for commitment is made, and shall continue in force for three calendar months from such date, and no longer.”

TRESPASS for an assault and false imprisonment.

Plea,—that, before the committing of the alleged trespasses in the declaration mentioned, and after the 9 & 10 Vict. c. 95, to wit, on the 1st of November, 1847, a county court, called the County Court of Surrey, was duly constituted, to be holden at Wandsworth, in the county of Surrey aforesaid, and the same court had from thence hitherto been duly holden, at Wandsworth aforesaid, under the said act of parliament: That, after the said court had been so constituted as aforesaid, and whilst the said court was so holden at Wandsworth as aforesaid, and before the committing the trespasses in the declaration mentioned, to wit, on the 19th of September, 1851, one Peter Plumley, then being the clerk of the said county court, duly issued, under the seal of the said court, a warrant of commitment, intituled “In the County Court of Surrey holden at Wandsworth, between Alfred Rosling, plaintiff, and William Hayes (the now plaintiff), defendant;” and directed “To the high-bailiff and others the bailiffs of the said court, and all constables and peace-officers within the jurisdiction of the said court, and to the governor or keeper of the \*common gaol at Horsemonger Lane;” by which said warrant,—after reciting, [\*234 that, at a court holden at Wandsworth, on the 2d of May, 1850, the said Alfred Rosling, by the judgment of the said court, in a certain suit wherein the said court had jurisdiction, recovered against the now plaintiff the sum of 6*l.* 17*s.* 6*d.* for his the said Alfred Rosling’s debt, and the sum of 2*l.* 8*s.* 1*d.*, the costs of the said suit, amounting together to the sum of 9*l.* 0*s.* 2*d.*, and that thereupon it was then and there

ordered by the said court that the now plaintiff should pay the same to the clerk of the said court, at his the said clerk's office in Wandsworth, by instalments of the sum of 8s. every four weeks; and reciting, that, the now plaintiff not having paid the said sum pursuant to the said order, a summons was, upon application of the said Alfred Rosling, duly issued from and out of the said court against the now plaintiff, by which said summons the now plaintiff was required to appear at the said county court of Surrey, holden at Wandsworth, on the 6th of March, 1851, to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectation he then had, and as to the property and means he then still had, of discharging the said debt, and as to the disposal he had made of any property; and reciting that it was duly proved upon oath at the said last-mentioned court, that the now plaintiff was personally served with the said summons; and reciting that the now plaintiff did not attend as required by such summons, or allege any sufficient excuse for not so attending, and that thereupon it was ordered by the judge of the said court that the now plaintiff should be committed for the term of ten days to the common gaol at Horsemonger Lane, in the county of Surrey, \*235] \*according to the form of the statute in such case made and provided, or until he should be discharged by due course of law,—the said high-bailiff, bailiffs, and others were thereby required to take the now plaintiff and deliver him to the governor or keeper of the common gaol at Horsemonger Lane, and the said governor or keeper was thereby required to receive the now plaintiff, and him safely keep in the said gaol for the term of ten days from the arrest under the said warrant, or until he should be sooner discharged by due course of law; for which that warrant should be a sufficient warrant to the said high-bailiff, bailiffs, and others, and to the said governor or keeper of the said common gaol: which said warrant bore date, to wit, the 19th of September, 1851, and was and is sealed with the seal of the said county court, and signed by the said Peter Plumley, then being the clerk of the said county court of Surrey, holden at Wandsworth aforesaid: That the said warrant, afterwards, and before the expiration of three calendar months from the date thereof, and whilst the same was in force, and before the committing of the said alleged trespass, to wit, on the 19th of September, 1851, was delivered by the clerk of the said court to one William Goff, then being one of the bailiffs of the said county court of Surrey, holden at Wandsworth, as aforesaid, to be executed in due form of law: That, by virtue of the said warrant, afterwards, and before the expiration of three calendar months from the date thereof, and whilst the said warrant was in force, and before the committing of the said supposed trespasses, to wit, on the 16th of December, 1851, the said

William Goff, then being one of the bailiffs of the said county court, did then, within the jurisdiction of the said court, take and arrest the now plaintiff by his body, and did then forthwith convey the now plaintiff to the said common gaol at Horsemonger Lane, and did then, to wit, on the day and year last aforesaid, at the said common gaol, and [\*236 \*before the expiration of three calendar months from the date of the said warrant, and whilst the same was in force, under and by virtue of the said warrant, deliver the now plaintiff to the defendant, who then was, and thence hitherto had been, and still was, the governor and keeper of the said common gaol at Horsemonger Lane: That the defendant, so then being such governor and keeper of the said common gaol, did then, at the said common gaol, and before the expiration of three calendar months from the date of the said warrant, and whilst the same was in force, and under and by virtue thereof, receive the now plaintiff into the said gaol, into his the now defendant's custody as such governor and keeper of the said common gaol: And that he, the defendant, being such governor and keeper of the said common gaol, under and by virtue of the said warrant safely kept and detained the now plaintiff in prison in the said common gaol, from the time when he so received the now plaintiff into the said common gaol as aforesaid until he the now plaintiff was discharged from the said prison by due course of law, to wit, for the said time in the declaration mentioned, as the defendant lawfully might for the causes aforesaid, — which were the said several trespasses in the declaration mentioned; verification.

To this plea the plaintiff replied,—that, after the passing of the 12 & 13 Vict. c. 101, intituled, &c., and before the issuing of the warrant in the said plea mentioned, to wit, on the 2d of February, 1850, Charles Christopher Lord Cottenham, then being the lord chancellor, duly appointed and authorized five of the judges of the courts holden under the said act of the tenth year of her Majesty's reign, that is to say, Alfred Septimus Dowling, Esq., Serjeant-at-law, Robert Brandt, Esq., barrister-at-law, James Espinasse, Esq., barrister-at-law, Charles James Gale, Esq., barrister-at-law, and William Turner, Esq., barrister-at-law, then being five of the judges of the \*said courts, to frame such general rules [\*237 and orders as to them should seem expedient, for and concerning the practice and proceedings of the courts holden under the said act, and for the execution of the process of such courts, and in relation to any of the provisions of the said act, as to which there had arisen doubts, or had been conflicting decisions in the said courts; which said judges afterwards and before the issuing of the said warrant, to wit, on the day and year last aforesaid, under and in pursuance of the said appointment and authority, framed divers general rules and orders for and concerning the several matters aforesaid, and, amongst others, the following general rule and order, that is to say, “warrants for commit-

ment, whenever issued, shall bear date on the day on which the order for commitment was made, and *shall continue in force for three calendar months* from such date, and no longer; but no order for commitment shall be drawn up or served,"—which said rule and order was afterwards, to wit, on the 1st of December in the year aforesaid, duly certified to the Right Hon. Thomas, Lord Truro, so then being the Lord Chancellor, to three of the judges of the superior courts of common law at Westminster, that is to say, to the Right Hon. Sir John Jervis, knight, then being the lord chief justice of the court of Common Pleas at Westminster, the Hon. Sir W. Erle, knight, then being one of the justices of the Court of Queen's Bench at Westminster, and the Hon. Sir S. Martin, knight, then being one of the barons of the Court of Exchequer at Westminster; which said three judges then approved of the said rule, and the said rule was forthwith after the said approval thereof, and before the issuing of the said warrant, to wit, on the 1st of April, 1851, laid before both houses of parliament, and six weeks after the same had so been laid before both houses of parliament had elapsed before the issuing of the said warrant: and that, although the \*238] plaintiff was arrested under the said warrant within three calendar months from the date thereof, to wit, on the 16th of December, 1851, and was imprisoned under colour thereof by the defendant for a term not exceeding ten days from the said arrest, to wit, until and upon the 25th of December in the year aforesaid; yet the defendant imprisoned the plaintiff and detained him in prison in the said gaol and prison under and by colour of the said warrant, after the expiration of three calendar months from the date thereof, to wit, from and after the 19th of December in the year last aforesaid, until and upon the 25th day of December in the year last aforesaid, which is the imprisonment and trespass in the declaration mentioned,—verification.

To this replication, the defendant demurred generally. The following point was marked in the margin,—“The defendant will argue, upon this demurrer, that, as the plaintiff was arrested, and received by the defendant into the said gaol under the warrant in the pleadings mentioned, within three calendar months from the date of the warrant, the defendant was justified under the warrant, as the keeper of the prison in the pleadings mentioned, in keeping the plaintiff in prison for the term of imprisonment mentioned in the said warrant, notwithstanding three calendar months from the date of the warrant expired before the term of the plaintiff's imprisonment mentioned in the warrant expired.”

*Channell*, Serjt., in support of the demurrer.—The question turns upon the construction of the 119th, 122d, 131st, and 135th of the rules of practice made under the authority of the 12 & 13 Vict. c. 101, s. 12. The 119th rule provides that “warrants of *execution* shall bear date on the day on which they are issued, and shall continue in force for three calendar months from such date, and no longer.” Rule 122

contains a similar \*provision as to successive warrants of execution. Rule 131 provides that "warrants for *commitment*, when- [\*239  
ever issued, shall bear date on the day on which the order for commitment was made, and shall continue in force for three calendar months from such date, and no longer; but no order for commitment shall be drawn up or served." And rule 135 contains a similar provision as to successive warrants of commitment. [JERVIS, C. J.—This point was incidentally decided in *Ex parte O'Neill*, 10 C. B. 57, where it was held, that a warrant of commitment for contempt, under s. 99 of the 9 & 10 Vict. c. 95, for non-appearance on a judgment-summons, was regular, though issued more than six months after the date of the judge's order,—notwithstanding, that, by the 37th of the then-existing rules of practice of county courts, a warrant was to be current only for two months after its date.]

*Gifford*, *contra*.(a)—The record shows a detention of the plaintiff for a period of seven days after the warrant of commitment had, by reason of the lapse of the three calendar months, ceased to be of any force. [JERVIS, C. J.—The 102d section of the 9 & 10 Vict. c. 95, enacts, "that, whenever any order of commitment shall have been made as aforesaid, the clerk of the said court shall issue under the seal of the court a warrant of commitment directed to one of the bailiffs of any county court, who by such warrant shall be empowered to take the body of the person against whom such order \*shall be made; and all [\*240 constables and other peace officers within their respective jurisdictions shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law." The 'gaoler is to carry out the *judgment* of the court: the warrant alone is not his justification.] The gaoler by detaining the plaintiff was enforcing the warrant after it had ceased to have any force: and, by his plea, he expressly treats the *warrant* as justification. [JERVIS, C. J.—That is not pointed out as ground of special demurrer. Could the plaintiff have been brought up to be discharged here, on the ground that the warrant had run out?] It is submitted that he might. [TALFOURD, J.—The 131st rule provides that the warrant of commitment "shall continue in force for three calendar months from its date, and no longer." Is it not an available warrant during the *whole* three months?] If it had been intended that the three months' limit should only apply to the *execution* of the warrant, the rule would have said so; as in the case of the *capias* under

(a) The points marked for argument on the part of the plaintiff, were,—

"That, by detaining the plaintiff in custody after three calendar months from the date thereof, force and effect was given to the warrant: and that such detention was contrary to the rule set out in the replication, which rule has the force and effect of an act of parliament."

the 1 & 2 Vict. c. 110, the 4th section of which provides that the writ shall be executed "within one calendar month after the date thereof, but not afterwards." (a)

JERVIS, C. J.—I should have been extremely sorry if I had felt myself constrained by any technical construction of the rule in question to decide in favour of the plaintiff upon this demurrer; for, such a decision would in effect operate pro tanto a repeal of the statute. Defendants would then take care to keep out of the way until the expiration of the \*241] warrant was at hand, and thus \*evade the judgment of the court. Construing the 131st rule in the strictest possible way, viz. that the warrant shall have no force or effect after the expiration of the three calendar months; still, having received the prisoner into his custody under the warrant whilst it was in full force, the gaoler is bound by the statute to *keep* him until the expiration of the period mentioned in the order of the court. I think we are doing no violence to the language of this rule so to construe it. The framers of it evidently meant to prevent a plaintiff having the means of harassing his debtor by keeping a warrant suspended over his head for an indefinite period. But there can be no reason, when once the warrant is executed by a caption, and it is altogether removed beyond the control of the party, why the judgment should not be carried into full effect. The fair construction of the rule is, that the warrant shall remain in force, for the purpose of the defendant's being arrested under it, for three calendar months only; but not so as to qualify the judgment or limit the period of imprisonment. I therefore think the defendant is entitled to the judgment of the court.

CRESSWELL, J.—I am entirely of the same opinion.

WILLIAMS, J.—The plain meaning of the 131st rule, is, that the warrant shall only continue capable of being put into operation for the period of three calendar months; not that, the warrant having been executed, the detention under it shall cease to be lawful from the moment the three months have expired.

TALFOURD, J.—I am of the same opinion. The construction contended for on the part of the plaintiff is one that no amount of ingenuity can make plausible.

Judgment for the defendant.

(a) See the 2 W. 4, c. 39, s. 10, which provides that "no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof," &c.

**\*HOLMES v. SPARKES and NICHOLS. April 22. [\*242**

In an action against a sheriff and bailiff for extortion on the execution of a *fi. fa.* at the suit of the plaintiff, under the 28 (commonly called 29) Eliz. c. 4, the declaration,—after stating the delivery of the writ to the sheriff to be executed,—alleged that the defendants, as sheriff and bailiff, respectively, wrongfully, &c., received and took from the plaintiff, for serving and executing the writ, more and other consideration and recompense than by the statute in such case made,—*that is to say*, by the statute passed in the *twenty-ninth* year of the reign of Elizabeth, intituled, &c.,—is limited and appointed, that is to say, the defendants then received and took from the now plaintiff, to wit, *8l.*, for serving and executing the said execution, although they *did not levy any sum of money whatever* by virtue or force of the said execution, and were entitled to no consideration or recompense whatever for serving or executing the said execution; whereby the plaintiff was aggrieved, &c., “contrary to the form of the statute in such case made and provided,” &c.—

Held, that the declaration sufficiently disclosed a cause of action upon the statute; and that the misrecital of it was immaterial, and might be rejected.

THIS was an action of debt against the sheriff of Surrey, for treble damages, under the statute of 29 Eliz. c. 4, for alleged extortion on the execution of a *fi. fa.*

The first count of the declaration stated, that whereas William John Roberts, theretofore, to wit, on the 27th of October, 1851, in the court of our lady the Queen before her justices at Westminster, by the consideration and judgment of the same court, recovered against the now plaintiff a certain debt of 200*l.*, and also 4*l.* 6*s.* 8*d.*, which in and by the same court were then adjudged to the said William John Roberts, and with his assent, for his damages which he had sustained as well on occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the now plaintiff was convicted,—as by the record and proceedings thereof remaining in the same court at Westminster aforesaid will more fully appear: That, the said judgment being in full force, and the said debt and damages remaining unpaid and unsatisfied, the said William John Roberts afterwards, to wit, on the 30th of October, in the year aforesaid, for the obtaining satisfaction thereof, sued and prosecuted out of the said court a certain writ of our said lady the Queen called a *testatum fi. fa.*, directed to the sheriff of Surrey; by which said writ our said lady the Queen commanded \*the said sheriff, that of the goods and chattels of the now plaintiff in his the said sheriff's [\*243 bailiwick, he should cause to be made the debt and damages aforesaid, together with interest on the sum of 107*l.* 16*s.* 8*d.*, at the rate of 4*l.* per centum per annum, from the said 27th of October in the year aforesaid, on which day the said judgment was entered up; and that he should have that money, with such interest as aforesaid, before the justices of our said lady the Queen at Westminster, immediately after the execution thereof, to be rendered to the said William John Roberts for his debt, damages, and interest aforesaid; and that he should do all such things as by the statute passed in the second year of the reign of our said lady the Queen he was authorized and required to do in that behalf; and in



what manner he should have executed the said writ, he should make appear to the justices of our said lady the Queen at Westminster immediately after the execution thereof, and have there the said writ; which said writ afterwards, and before the delivery thereof to the said sheriff as thereafter mentioned, to wit, on the said 30th of October in the year aforesaid, was duly endorsed as follows, that is to say, "Levy 107l. 16s. 8d., with interest thereon as within directed, besides, &c., and 1l. 16s. for writs of execution, warrant, &c.;" and which said writ, so endorsed, was afterwards, to wit, on the day and year last aforesaid, delivered to the defendant John Sparkes, who then and from thence until and at and after the committing of the offence thereafter mentioned was sheriff of the said county of Surrey, to be executed in due form of law: That the defendant John Sparkes, so being such sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, duly appointed the defendant James Nichols to be his bailiff to execute the said writ: Nevertheless, the defendant John Sparkes so being such sheriff, and the defendant James Nichols so being such bailiff, not \*244] \*regarding their duty in that behalf, nor the statute in such case made and provided, but contriving to injure the plaintiff, afterwards, to wit, on the day and year last aforesaid, by reason and colour of their respective offices as such sheriff and bailiff as aforesaid, wrongfully, illegally, and oppressively had, received, and took of and from the now plaintiff, for the serving and executing of the said writ of execution, more and other consideration and recompense than by the statute in such case made, that is to say, by the statute passed in the 29th year of the reign of the late Queen Elizabeth, intituled "An act to prevent extortion in sheriffs, under-sheriffs, and bailiffs of franchises or liberties, in cases of execution," is limited and appointed, that is to say, the defendants then had, received, and took of and from the now plaintiff a large sum of money, to wit, 8l., for serving and executing the said execution, although the defendants did not, nor did either of them, levy any sum of money whatever by virtue or force of the said execution, and were entitled to no consideration or recompense whatever for serving or executing the said execution; and that thereby the now plaintiff was and is damaged and aggrieved, to the amount of the said sum of money, to wit, to the sum of 8l., contrary to the form of the statute in such case made and provided, and thereby and by force of the said statute, an action had accrued to the now plaintiff to demand and have of and from the now defendants the sum of 24l., being treble the amount of the said damages, and parcel of the sum above demanded; yet the defendants had not paid the said sum above demanded, or any part thereof, to the plaintiff's damage of 50l., &c.

To this count the defendant demurred specially, assigning for causes, amongst others,—that the said first count does not show with sufficient certainty any cause of action against the defendants in respect of the

sum \*claimed by the plaintiff in the said first count ;—that it does not show with sufficient certainty whether the said sum therein [\*245 claimed by the plaintiff, is claimed by reason of there having been no service and no execution of the writ therein mentioned, or whether the plaintiff intends to admit the service and execution of the said writ, and to allege that such service and execution was not such a service and execution as would by law entitle the defendants to a consideration or recompense ;—that it is not shown with sufficient certainty how or in what manner the defendants were or are entitled to no consideration or recompense whatever for serving or executing the said execution as in the said first count alleged ;—that the allegation in the first count, that the defendants were entitled to no consideration or recompense whatever for serving or executing the said execution, involves matter of law ; and that the facts from which the court might see whether or not such allegation was well founded, should have been stated ; that the allegation that the defendants did not, nor did either of them, levy any sum of money, is ambiguous and uncertain, and does not show with sufficient certainty that the defendants were not entitled to some consideration or recompense for serving and executing the said writ, and that the facts ought to have been stated, in order that it might be shown to the court whether the same did amount to a levy in point of law or not ;—that it is not shown with sufficient certainty whether any or what goods of the plaintiff were taken under or by colour of the said writ of execution, or whether any or what compromise was entered into between the now plaintiff and the said William John Roberts, so as to discharge the defendants from executing the said writ, or how the said sum of 8*l.* was obtained under colour of their office ;—that there is no such statute passed in the 29th year of the reign of Queen Elizabeth, intituled “An act to \*prevent extortion in sheriffs, under-sheriffs, and bailiffs of franchises or liberties, in cases of execu- [\*246 tion,” as in the said first count of the declaration mentioned, &c.

The plaintiff joined in demurrer.

*Phipson*, in support of the demurrer.—The count is ambiguous : it does not set out with sufficient certainty what the sheriff was entitled to take, and what he did take ; but there is a general allegation that no levy took place at all, and that consequently the sheriff was entitled to nothing for poundage. The defendant was not bound to take issue upon what is or is not in law a levy. It may be conceded that the sheriff is entitled to no poundage where there has been no levy : but what amounts to a levy is in many cases matter of grave contest. *Com. Dig. Pleader* (C. 76), says, “The plaintiff in his declaration ought to aver every fact, without being informed of which the court cannot judge whether the plaintiff has cause of action. *Vide Action upon Statute* (A. 3). As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the court that his case is within the statute ; as, in quare impedit by the King on the

statute 13 Eliz. c. 12, for not reading the thirty-nine articles, it ought to be averred that it was a benefice with cure,"—citing *The King v. The Bishop of Lincoln*, 1 And. 62, *Rex v. Gibson*, 2 Lutw. 1086. [JERVIS, C. J.—What do you suggest should have been the allegation here?] The declaration should have alleged, supposing there had been a seizure, and no fruits, that the sheriff abandoned without levying the money. [JERVIS, C. J.—Suppose there was no seizure?] If the sheriff levy under a fi. fa., he is entitled to poundage, though the parties compromise before sale: *Alchin v. Wells*, 5 T. R. 470. If no seizure had taken place, the plaintiff might have said so. The allegation, as it stands, would rather lead one to assume that there had been no

\*247] \*execution executed because there was a compromise. Parke, B., lays it down in *Chapman v. Bowlby*, 8 M. & W. 249,† that poundage is payable to the sheriff in all cases where the money is obtained under compulsion of the writ. [CRESSWELL, J.—Then, a denial of a levy is a denial that the money was obtained under compulsion of the writ.] In *Ashby v. Harris*, 2 M. & W. 673,† the Court of Exchequer inclined to think that a declaration of this sort must state the sum actually taken by the sheriff. [JERVIS, C. J.—Suppose the sheriff seized, and was obliged to pay over the whole sum levied, in satisfaction of the landlord's claim for rent,—how should that be alleged?] According to the fact. [JERVIS, C. J.—Concluding, and so the defendant did not levy any money whatever by virtue of the execution?] Precisely so: and then the defendants might have demurred, and so had the judgment of a court of error. In *Usher v. Walters*, 4 Q. B. 553 (E. C. L. R. vol. 45), 3 Gale and D. 594, the plaintiff declared in debt against the sheriff, alleging that the defendant had, in executing a fi. fa. against the plaintiff, levied a sum of money named, including sums named severally for expenses and landlord's rent; and that, contrary to the form of the statutes, he took of the plaintiff more consideration and recompense than by the statutes is allowed, that is to say, 10*l.* 4*s.* 6*d.*, when by the statutes there were allowed only, &c. (naming the several sums), being at the rates severally named for poundage, for the warrant, for executing the warrant, for the man left in possession during a time named, for the sale, and for the certificate thereof, the excess being 4*l.* 7*s.* 9*d.*, whereby, and by force of the statute, an action accrued to the plaintiff to demand, &c., treble the excess: and it was held, on special demurrer, that the declaration was bad for not showing how the several sums which could legally be taken were fixed, and of what items the excess was made up. "I cannot tell," said Patteson,

\*248] J., "from \*this declaration how the excess arises: a gross sum only is named." Here, the substantial complaint is, that the declaration does not show that this is a case in which the sheriff was not entitled to poundage. The last ground of demurrer is clearly fatal,—that the declaration improperly describes the statute as a statute passed

in the *twenty-ninth* year of the reign of Elizabeth. The statute intitled "An act to prevent extortion in sheriffs, &c., in cases of execution," was, in truth, passed in the *twenty-eighth* year of that reign. The misdescription is fatal: The King *v.* John Biers, 1 Ad. & E. 327, 3 N. & M. 475 (E. C. L. R. vol. 28).<sup>(a)</sup>

*Willes*, contra.—No doubt, it is a mistake to describe the statute in question as a statute made and passed in the 29th year of the reign of Elizabeth,—though it is so called in the books; the parliament having only been held by adjournment in that year. But it is stated under a "viz.," and the allegation was wholly unnecessary to the maintenance of the action: the declaration sufficiently shows that the defendants have been guilty of an offence against the statute which is applicable to the case; and the court will refer it to the proper statute, though the plaintiff has by mistake given an erroneous reference. The argument on the other side assumes that there is something here for the plaintiff to describe, and which he has not sufficiently described. That, however, is a fallacy: the plaintiff is not stating something which has, but something which has not, taken place under the writ. Since the case of *Alchin v. Wells*, the sheriff has always been considered to be entitled to poundage, where he has levied the money either actually or constructively. If he seizes, and the seizure results in nothing, either from the landlord's claim for rent \*absorbing the whole, or from any other cause, there is an absence of levying; and that is a [\*249 result in fact, not a result in law. [JERVIS, C. J.—According to Mr. Phipson's argument, you must negative the doing of every act which might possibly amount to a levy, as well as state affirmatively what was done.] In *Usher v. Walters*, the declaration did not show what had been illegally taken: there was a confusion between the two statutes of 29 Eliz. c. 4, and 7 W. 4 & 1 Vict. c. 55, s. 2. Patteson, J., says: "This action is founded on stat. 29 Eliz. c. 4, which relates only to taking more than the poundage there limited. Then, stat. 7 W. 4 & 1 Vict. c. 55, s. 2, makes lawful the taking of such fees as shall be allowed by the officers under the sanction of the judges. It is now contended, that, under the power given by the earlier statute, a party may sue for taking more fees than are authorized under the later statute; for, if under the later statute fees may be taken which could not be taken under the earlier one, the earlier is at least so far repealed. The plaintiff then seeks to incorporate the two statutes. It seems to me very difficult to bring stat. 29 Eliz. c. 4, to bear at all upon the present state of things. But, if this can be done, you must at any rate show how the different sums which might legally be taken were ascertained. That objection is fatal." The doubt left by that case is in a great degree cleared up by the subsequent case of *Pilkington v. Cooke*, 16 M. & W. 615,† which has brought the form of declaring in these

(a) And see *Gibbs v. Pike*, 8 M. & W. 223,† 9 Dowl. P. C. 731.

cases very much to what it was before the passing of the 7 W. 4 & 1 Vict. c. 55. It was there held that the statute 29 Eliz. c. 4, is not repealed by the 7 W. 4 & 1 Vict. c. 55; but that the only effect of the latter statute, is, to exempt from the penalties of the statute of Elizabeth, the cases in which the sheriff shall take no larger fees than shall be allowed by order of the judges: and therefore, in a declaration on the case for \*extortion on the statute of Elizabeth, it is not necessary to negative the defendant's having had authority under the statute of Victoria to take the fees complained of; but that is matter of defence which should come by plea. The form given in Chitty on Pleading, 7th edit., Vol. 2, p. 635, for a declaration in case on the statute 28 Eliz. c. 4, against the sheriff for extortion, at the suit of the plaintiff in the action, is general.

*Phipson*, in reply.—The cases show that a declaration on this statute cannot be good unless it avers facts to show that the offence contemplated by the statute has been committed. In *Berton v. Lawrence*, 5 Exch. 816,† the Court of Exchequer intimated an opinion, that, in debt on this statute against the sheriff for extortion on executing several writs of *fi. fa.*, it is not sufficient to allege that the defendant took for the said executions a certain sum, being a larger recompense than is by the statute limited, that is to say, £— more: but that the declaration should state what he ought to have taken, and what was the excess on each writ. In *Wrightup v. Greenacre*, 10 Q. B. 1 (E. C. L. R. vol. 59), the declaration disclosed the precise nature of the alleged extortion.

. JERVIS, C. J.—It seems to me that there is nothing in either of the points urged on the part of the defendants. The declaration alleges that the defendants, as sheriff and bailiff, respectively, wrongfully, illegally, and oppressively had, received, and took of and from the plaintiff, for the serving and executing the writ of execution, more and other consideration and recompense than by the statute in such case made,—that is to say, by the statute passed in the *twenty-ninth* year of the reign of the late Queen Elizabeth, intituled “An act to prevent extortion in sheriffs, undersheriffs, and bailiffs of franchises or liberties, in cases of execution,”—is limited and \*appointed, that is to say, \*251] the defendants then had, received, and took of and from the now plaintiff a large sum of money, to wit, 8*l.*, for serving and executing the said execution, although the defendants did not, nor did either of them, levy any sum of money whatever by virtue or force of the said execution, and were entitled to no consideration or recompense whatever for serving or executing the said execution, &c. I think the ground of complaint is not only stated correctly, but is stated in the only way in which it could have been stated. If the defendants' argument amounts to anything, a plaintiff, in declaring upon this statute, must show every conceivable mode of executing the writ which would con-

structively amount to a levy, and then negative each specifically. That clearly cannot be necessary. If the allegation here is sufficiently certain, the defendant might and ought to have traversed it. As to the misrecital of the statute, that is quite immaterial. It was enough to state that the thing done was contrary to the form of the statute in such case made and provided.

CRESSWELL, J.—I am of the same opinion. If the year of the reign were really material, we could not reject the viz. But the declaration goes on to say that the matter charged was done contrary to the form of the statute in such case made and provided; and that clearly is sufficient. From the allegation in the declaration, that the defendants “did not levy any sum of money whatever by virtue or force of the said execution,” I understand the plaintiff to mean that the defendants did nothing which amounted to a levy. The defendant is not by this form of pleading deprived of the opportunity of raising the question upon the record; for, if he traversed this allegation, it would be for the judge to say whether or not that which was done amounted in law to a levy, and the defendant might tender a bill of exceptions.

\*WILLIAMS, J.—I am of the same opinion. I think all the rules of pleading are satisfied by this declaration. [\*252

TALFOURD, J., concurred.

Judgment for the plaintiff.

## WARD v. The Right Honourable Lord LONDESBOROUGH.

Jan. 14.

The plaintiff received a letter of allotment, allotting him 100 shares in a projected railway, upon which he paid a deposit of 2l. 2s. per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the following provision:—“In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction.”

There was no evidence of any application by the plaintiff for shares, or that his allotted shares had been exchanged for scrip; and it appeared that he had never signed the parliamentary contract or subscribers’ agreement. The project proving abortive,—

Held,—first, that money had and received lay, to recover back the deposit paid:

Secondly, that the letter of allotment and circular were admissible in evidence without being stamped, inasmuch as they did not constitute the whole agreement between the directors and the allottees:

Thirdly, that the sending of the letter of allotment and circular to the plaintiff, was sufficiently proved by the statement of the secretary of the company, that he had received instructions to send them to all the allottees, that the plaintiff was one of them, and that he believed he had sent them to him.

ASSUMPSIT for money lent, money had and received, and money found due upon an account stated. Plea, non assumpsit.

The action was brought to recover the sum of 210l., being the amount paid by the plaintiff as a deposit on one hundred shares in The Dover and Deal Railway Company. 22 C. L. J. 138; 115 U. S. 346:

The cause was tried before Jervis, C. J., at the sittings in London after Michaelmas Term last. The facts were as follows:—

The Dover and Deal Railway Company was provisionally registered on the 2d of October, 1845. The requisite number of subscribers' names was obtained, and the bill for incorporating the company was brought before parliament in the session of 1846, but reported against.

\*253] The defendant was a member of the provisional \*committee, and also of the managing committee, from the inception of the undertaking. He took an active part in the proceedings, and frequently occupied the chair at the meetings of the committee. The first meeting which the defendant attended, was held on the 1st of November, 1845. The defendant was the chairman of that meeting, and signed the minutes as such; and the managing committee, of which he was a member, was then appointed. Another meeting was held on the 7th of November in the same year, at which the defendant was also present. Several other meetings were held between the 1st of December, 1845, and the 22d of April, 1846, many of which the defendant attended: but it did not appear that he was present at any meeting held after that date.

Shortly after the formation of the company, a negotiation was opened between the managing committee and the directors of the South-Eastern Railway Company, the object of which was to amalgamate the two companies, so far as related to the line from Dover to Deal, the South-Eastern Railway Company being desirous to continue their line to Deal; and an arrangement was then entered into (which had since been repudiated by the South-Eastern Railway Company), that, in the event of the Dover and Deal Railway Company obtaining their act of incorporation, the shareholders in the latter company should be entitled to stock in the South-Eastern Railway Company; and, in the event of the Dover and Deal Railway Company failing to obtain their act, then that the South-Eastern Railway Company would indemnify the Dover and Deal Railway Company against all expenses, and so enable the latter company to return to their shareholders all the deposits paid up.

In consequence of that arrangement, a meeting of the committee of the Dover and Deal Railway Company was held on the 24th of January, \*254] 1846, at which \*meeting the defendant presided, when the following letter was read and approved, and ordered to be circulated:—

“7, Coleman Street, Jan. 24, 1846.

“Dover and Deal Railway.

“In forwarding to you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing-orders of both Houses of Parliament had been complied with, and certain arrangements entered into with the South-Eastern Company had been brought to a conclusion.

"The directors have now the greatest satisfaction in stating the arrangements with the South-Eastern Company have been concluded; and they are fully justified in asserting that the company will be placed in such a position as to insure its proprietary against loss: and, in the event of the passing of the bill, shares in the South-Eastern Railway will be allotted to the proprietors, in lieu of stock in this company.

"The directors, in making this announcement, feel that the affairs of the company, as now settled, are on such a basis as to insure important advantages to its proprietors, and to warrant the directors in proceeding to parliament with the undertaking, with every expectation of success.

*"In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction.*

"By order,

"S. P. HOOK,  
"G. T. THOMPSON, } Joint Solicitors."

The secretary, who was called to prove the sending of this circular and the letter of allotment, stated, that general directions had been given by the board of directors to send them to all who had applied for shares; that some were posted by himself, and some by other persons; that \*he did not know whether he had sent them to the plaintiff [\*255 or not, but to the best of his belief he had.

The letter of allotment was in the following form:—

"Dover and Deal Railway.

"100 shares: deposit, 2 guineas per share.

"I have to inform you that the provisional directors have on application allotted to you one hundred shares in this undertaking, and that the deposit thereon must be paid to one of the under-mentioned bankers on or before the 6th of February next, otherwise the allotment will be void.

"On presentation of this letter, and payment of the deposit, the bankers will give a receipt, which will be exchanged for scrip, on your executing the parliamentary contract and subscribers' agreement."

At the bottom of this document was the bankers' receipt for 210*l.*, which was proved to have been paid in by the plaintiff to the account of "The provisional committee of the Dover and Deal Railway," at the Commercial Bank of London, on the 6th of February, 1846.

There was no evidence of any application by the plaintiff for shares, or that his allotted shares had been exchanged for scrip; and it appeared that he had never signed the parliamentary contract or subscribers' agreement.

On the part of the defendant it was submitted,—first, upon the authority of *Clements v. Todd*, 1 Exch. 268,† and *Ashpitel v. Sercombe*, 5 Exch. 147,† that, the plaintiff having paid the money upon the con-



tract mentioned in the letter of allotment, money had and received would not lie to recover it back, whether he had signed the parliamentary contract and subscribers' agreement or not, the agreement to sign being for this purpose tantamount to actual signature,—secondly, that the circular and letter of allotment were respectively inadmissible for \*256] want of stamps,—thirdly, that there was no evidence of \*the sending of the circular and letter of allotment to the plaintiff.

These several objections were overruled, and his lordship directed a verdict to be entered for the plaintiff for the amount claimed.

*Byles*, Serjt., now moved for a new trial on the ground of misdirection.—1. *Clements v. Todd*, 1 Exch. 268,† is a distinct authority that this action for money had and received is not maintainable. There, the plaintiff signed an application for shares in a company provisionally registered: the application contained the usual undertaking to sign the parliamentary contract and subscribers' agreement, when required: the plaintiff had no letter of allotment, but, having paid the deposit, received scrip-certificates in the usual form, stating that "the subscribers' agreement and parliamentary contract had been signed by the person to whom the certificate was issued:" the plaintiff, in fact, never signed either the subscribers' agreement or parliamentary contract: and, the scheme proving abortive, he brought an action for money had and received, to recover back the deposit: but it was held that he had placed himself in the same situation as if he had signed the subscribers' agreement and parliamentary contract, and therefore could not recover. The decision in *Ashpittel v. Sercombe*, 5 Exch. 147,† proceeded expressly upon the particular facts of that case.

2. The circular of the 24th of January, 1846, was evidence of the contract between the plaintiff and the company, and therefore should have been stamped: as also should the letter of allotment. In *Vollans v. Fletcher*, 1 Exch. 20,† where the letter of allotment was held not to require a stamp, no letter of application was put in. [CRESSWELL, J.—Why are we to assume that there was one? In the ordinary case of an \*257] agreement for a \*lease, signed by the lessor only, the lessee doing nothing but entering upon the possession, nobody ever dreamt that a stamp was not requisite. [CRESSWELL, J.—The plaintiff was not bound by his proposal.] By that and the assent taken together. [WILLIAMS, J.—*Willey v. Parratt*, 3 Exch. 211,† seems to meet your objection. There, to a letter in the ordinary form, applying for shares in a projected railway company, the plaintiff received in answer a letter of allotment, headed "not transferable," and requiring him to pay a deposit of 2*l.* 2*s.* per share. The words relating to the deposit were erased, and the letter was endorsed with a memorandum, that the committee of management, being of opinion that it would be an accommodation to the subscribers if they were allowed the option of either paying the whole or a portion of their deposits at that time, and the

remainder at a future day, and considering it unnecessary to lock up the large sum of money over and above what any expenses could require, in the then state of the money market, there being no necessity for so doing, proceeded to state that the plaintiff was directed to pay 10s. per share on a certain day, and 1*l.* 12s. per share on a subsequent day. The scheme failed, the money having been expended in preliminary expenses. In an action brought to recover back the deposit paid of 10s. per share,—it was held, that the letter of allotment did not require a stamp; and that the committee of management were empowered to expend the money in such preliminary expenses, and therefore that the plaintiff was not entitled to recover. “The plaintiff,” says Pollock, C. B., “applied for shares by letter, offering certain terms; the letter of allotment allotted shares on different terms. These two letters did not constitute any agreement between the parties. The contract arises from the offer contained in the letter of allotment, and the acceptance of it by the plaintiff, by complying with its terms in \*paying the money, &c. The entire contract between the parties, therefore, [\*258 is not in writing, and cannot be stamped. On the authority of *Vollans v. Fletcher*, we are of opinion that the letter of allotment was properly received in evidence without a stamp.” Maule, J., referred to *Vaughton v. Brine*, 1 M. & G. 359, 1 Scott N. R. 258, and *Chaplin v. Clarke*, 4 Exch. 408.†] No evidence having been given of the letter of application, it must be assumed that it did not differ from the letter of allotment. [JERVIS, C. J.—In *Moore v. Garwood*, 4 Exch. 681,† in an action for money had and received, by an allottee of railway scrip, for the recovery of his deposit, on the abandonment of the scheme, the letter of allotment was offered in evidence by the plaintiff, who called upon the defendant to produce the letter of application, which he refused to do: and it was held, in error upon a bill of exceptions, that, under such circumstances, the letter of allotment was receivable in evidence without a stamp, as there was no presumption that the two letters were ad idem, and that the contract depended upon them alone.] That is a very different case. Where a document is called for, on notice, and not produced, the party failing to produce it cannot raise the objection of want of stamp.(a) A unilateral agreement on the part of the company, to be made binding by something afterwards [\*259 \*to be done by the allottee, falls distinctly within the stamp-act. [MAULE, J.—That is directly contrary to the two cases of *Chaplin v. Clarke*, and *Moore v. Garwood*. How does it appear here that the

(a) See *Crowther v. Salomons*, 6 C. B. 758 (E. C. L. R. vol. 60). There, upon the defendant's refusal, after notice, to produce at the trial the original of an agreement on which the plaintiff relied, a witness for the plaintiff produced an unstamped copy; but, on his cross-examination, he stated that the original agreement was not stamped at the time it was executed and acted upon; and it appeared that the plaintiff's attorney had had inspection of the original shortly before the action: and it was held, that the presumption of the document's being regularly stamped,—which would have arisen from the defendant's refusal to produce it,—being thus rebutted, the copy was properly rejected.

application for shares was in writing?] It does not appear: the argument assumes that it was not. Suppose all that is to be done on the one side is in writing, and on the other an act,—would not a stamp be necessary? [MAULE, J.—No. The writing would not be evidence of a contract alone.] In *Ramsbottom v. Mortley*, 2 M. & Selw. 445, a written paper signed by the auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable,—was held to require a stamp, under the 48 G. 3, c. 149, sched. part 1, tit. *Agreement*, which imposed a duty “on any agreement or minute or memorandum of any agreement, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument;” which are the words of the statute now in force. [MAULE, J.—The auctioneer was the agent of both parties.] It is not so put by the court. Lord Ellenborough says: “It may not be evidence of the whole contract, but it is evidence of a material part. If a necessary part in the proof of the contract, I think it ought to be stamped.” And Dampier, J., says: “This may not be such a memorandum of the contract as would satisfy the statute of frauds, but it is such a memorandum of an agreement as requires a stamp. It is not evidence of the entire contract, but is a memorandum signed by *the agent of one of the parties*, and surely that is evidence of the contract.” [MAULE, J.—That certainly is inconsistent with what is said in *Moore v. Garwood*. WILLIAMS, J.—In *Drant v. Brown*, 3 B. & C. 665 (E. C. L. R. vol. 10), 5 D. & R. 582 (E. C. L. R. vol. 16), A. entered into a written agreement with B. for the hire of a piece of land for the purpose of making bricks. \*C. afterwards made an offer in writing  
\*260] to let another piece of land to A. upon the terms contained in the agreement between him (A.) and B., and at a subsequent time, A. verbally accepted this offer: in an action by C. for a breach of some of the terms of this contract,—it was held, that the written offer made by C. was admissible in evidence without being stamped. Holroyd, J., there said: “A stamp is not necessary to every writing given in evidence to support an agreement, but only to agreements themselves, or minutes or memorandums of agreements. This was a mere proposal: if it had been accepted by writing, that must have been stamped, but, being accepted by parol, the agreement was in law a parol agreement.” MAULE, J.—The decision of the Exchequer Chamber in *Moore v. Garwood* proceeded very much upon the authority of *Drant v. Brown*. To make an agreement chargeable with stamp-duty, it must contain the whole terms agreed on. JERVIS, C. J.—A bill of exceptions was tendered to me at the trial. I understood the defendant meant to go to the Exchequer Chamber. MAULE, J.—The cases are so numerous in the Exchequer Chamber, that he had better go to the House of Lords.]

3. There was no evidence of the sending of the circular and letter

of allotment to the plaintiff. [JERVIS, C. J.—The evidence was reasonably precise. The fair presumption is that he received them. CRESSWELL, J.—The plaintiff was an allottee. He produces a letter, which, according to the evidence of the secretary, has that gentleman's handwriting upon it. The secretary had directions to send such a letter, and he believed he had sent it. What more could be required? If the plaintiff had no letter of allotment, he paid his money under a mistake, and the defendant has no right to retain it.] Much more than the witness's belief, it is submitted, should be required in a case like this.

\*MAULE, J.—The observations which we have made upon the several cases cited seem to me sufficiently to dispose of all the [\*261 objections. By those authorities we are bound. I therefore think there should be no rule.

The rest of the court concurring,

Rule refused.

### RANDALL v. MOON. April 24.

Two actions having been brought upon a bill of exchange,—the one against the drawer, the other against the acceptor,—the defendant in the first action obtained a judge's order for a stay of proceedings on payment of debt, interest, and costs:—Held, that the payment under that order could not be pleaded, in bar of the further maintenance of the second action, as a payment in satisfaction and discharge of the causes of action against the acceptor, or relied on as a ground for reduction of damages.

THIS was an action of assumpsit on a bill of exchange for 49*l.* 18*s.*, drawn by one W. A. Turner upon and accepted by the defendant, and endorsed by Turner to one Worms, and by him to the plaintiff.

Plea,—to the further maintenance of the action,—that, after the bill became and was due and payable, and whilst the plaintiff was the holder thereof, to wit, by reason of the said endorsement thereof to him in the declaration mentioned, and after the issuing of the writ of summons in this cause, the said W. A. Turner in the declaration mentioned, to wit, at the request of, and for and on behalf of the defendant, paid to the plaintiff, who then accepted and received of and from the said W. A. Turner, a large sum of money, to wit, a sum amounting in the whole to all the moneys in the declaration mentioned, in satisfaction and discharge of all the causes of action in the declaration mentioned; and the said W. A. Turner thereupon became entitled to have the said bill delivered up to him by the plaintiff; and the defendant further said that the plaintiff was not suing in this action as trustee of, or for the benefit of, the said W. A. Turner,—verification and prayer of judgment if, &c.

Replication,—that the said W. A. Turner did not, for or on behalf

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\*262] of the defendant, pay to the plaintiff, nor \*did the plaintiff receive, the money in satisfaction of the said causes of action in the declaration mentioned.

The cause was tried before Maule, J., at the first sitting at Westminster in this term. It appeared that the bill was accepted by the defendant for Turner's accommodation, but that the plaintiff had no notice of that fact; that the bill became due on the 4th of March last; that, on the 6th, two actions were commenced upon it,—one against Turner, the other against the now defendant; that, on the 13th, a summons was taken out in the action of *Randall v. Turner*, returnable on the 16th, to stay proceedings in that action, upon payment of the debt and interest and costs; that that summons was opposed by the plaintiff, but the judge made an order for staying the proceedings accordingly; that the amount of the bill with interest and costs was paid on the same day, with the drawer's money; and that, on the 22d, the declaration in this action was delivered.

Two letters, dated respectively the 19th and 21st of March, from the plaintiff's attorney to the defendant, intimating that he should proceed unless the costs were paid, were put in.

Upon these facts, the learned judge directed a verdict to be entered for the plaintiff for 50*l.*, the amount of the bill and interest; reserving leave to the defendant to move to enter a verdict for him, or to reduce the damages to 2*l.* 2*s.*

*Macnamara* now moved accordingly.—In *Jones v. Broadhurst*, 9 C. B. 173 (E. C. L. R. vol. 67), where this matter underwent much consideration, it was held that satisfaction of a bill as between a drawer or endorser and an endorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the endorsee: but the facts of that case are somewhat \*different from the facts here. [JERVIS, \*263] C. J.—Is the payment of debt and costs, under a judge's order, in the one action, and the acceptance thereof, a payment and acceptance in accord and satisfaction of the plaintiff's claim in the other action? That would, in effect, be, making an order to pay a smaller sum in satisfaction of a larger.] The plea avoids the objections that were fatal to the plea in *Jones v. Broadhurst*. "The plea," says Cresswell, J., in delivering the judgment, "does not allege whether such satisfaction was given and accepted before or after the bill became due, nor is it averred to have been at the request, or for or on behalf of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him: nor does it in any way connect the defendant with the transaction, or show any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor." Those difficulties do not present themselves in the present case. Here, the bill could not have been re-issued after the payment

by the drawer : *Lazarus v. Cowie*, 2 Gale & D. 487 : and there was that sort of legal privity between the defendant and Turner, the absence of which was so much relied on in *Jones v. Broadhurst*,—Turner being the person, as between him and the defendant, primarily liable on the bill. [CRESSWELL, J.—The plea states that Turner paid the amount at the request, and for and on behalf of the defendant. Where a debtor pays his debt, he pays it on his own behalf.] The proof of payment by Turner in substance proves the allegation in the plea. The cause of action is the debt ; that is satisfied. The plaintiff had no right to continue the action for nominal damages and costs : *Beaumont v. Greathead*, 2 C. B. 494 (E. C. L. R. vol. 52). There, A. being sued on a joint and several promissory note made by himself and by B. and C., \*pleaded that *he* paid to the plaintiff, and the plaintiff accepted [\*264 and received, the moneys in the declaration mentioned, in full satisfaction and discharge of the debt *and damages* in the declaration mentioned : and it was held, that the plea was sustained by proof that the amount of the note was paid by C. ; and that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note. [JERVIS, C. J.—There, the payment was before the commencement of the action.] In *Thame v. Boast*, 12 Q. B. 808, to an action of assumpsit on a check for 25*l.*, the defendant pleaded payment and acceptance of money (after action brought) in satisfaction of the promise, damages, and costs ; and, issue being thereon joined, he proved payment and acceptance of 25*l.*, and that the plaintiff, after being paid, had declined a sum offered for costs, and said he would pay them himself : it was held that such proof supported the issue on the defendant's part, and afforded a good defence ; for, the plaintiff, after payment of 25*l.*, could not have proceeded in the action for damages, they being merely nominal ; and he could not have proceeded for costs, having no ground of action for damages. Lord Denman said : “ The debt was paid and accepted, and the damage was merely nominal, independently of the costs. The case of *Beaumont v. Greathead* is an authority to show that, after acceptance of the debt in satisfaction, the plaintiff cannot proceed for nominal damages : and, as he would not be entitled to proceed for costs only, independent of some damage, we think that the verdict for the defendant is sustainable.” [CRESSWELL, J.—It cannot be laid down, as a general proposition, that an action cannot be maintained for nominal damages, after *Mazetti v. Williams*, 1 B. & Ad. 415. JERVIS, C. J.—In *Thame v. Boast*, the money was paid in satisfaction of debt *and costs*. And see *Nosotti v. Page*, \*10 C. B. 643 (E. C. L. R. vol. 70).] In [\*265 that case, there was no plea to the further maintenance of the action, that the debt was satisfied. [JERVIS, C. J.—The particulars admitted payment.] That was an action of debt : this is on promises : the gist of the action is, damages ; costs form no part of the cause of

action. In *Corbett v. Swinburne*, 8 Ad. & E. 678 (E. C. L. R. vol. 35), 3 N. & P. 551, it was held that it is a good plea, in assumpsit, that, as to 50*l.*, parcel, &c., the plaintiff ought not further to maintain, &c., because, after the commencement of the action, the defendant endorsed and delivered to the plaintiff a bill of exchange for 82*l.*, drawn by C., and accepted by B. (or, that the defendant paid the plaintiff 50*l.*), in full satisfaction and discharge of the defendant's promise as to 50*l.*, and of all damages by the plaintiff sustained by reason of the non-performance of such promise (not mentioning costs), which bill (or money) the plaintiff took and received in such full satisfaction and discharge. And see *Joule v. Taylor*, 7 Exch. 58.†

At all events, the verdict can only be entered for nominal damages. [JERVIS, C. J.—How can we reduce the amount, when there is no plea of payment?] It is submitted that this plea is substantially a plea of payment: an informal plea of payment may be used in reduction of damages: *Lord v. Ferrand*, 1 D. & L. 630. In *Newton v. Blunt*, 3 C. B. 675 (E. C. L. R. vol. 54), the court stayed the proceedings in an action against one of several joint-contractors, the debt having been satisfied by another of them. [JERVIS, C. J.—Being joint-contractors, payment by one enured as a payment by all of them.]

JERVIS, C. J.—I am of opinion that there should be no rule in this case. Two points are presented for our consideration. In the first place, it is said that the defendant is entitled to have the verdict entered for him, because the plea was proved: secondly, that, even if the \*266] \*plea is not proved, the defendant is at all events entitled to the benefit of the payment by Turner, in reduction of damages.

The plea, which is pleaded to the further maintenance of the action, states, that after the bill became due, and after the commencement of the action, Turner (the drawer), at the request of, and for and on behalf of the defendant, paid to the plaintiff, who then accepted and received of and from Turner, a sum amounting to all the moneys in the declaration mentioned, in satisfaction and discharge of all the causes of action in the declaration mentioned. It seems to me that the payment and acceptance of the money under the judge's order in the action by the plaintiff against Turner, the drawer,—the plaintiff having no notice that Moon was an accommodation acceptor,—cannot be considered as a payment on behalf of the acceptor, or an acceptance in satisfaction and discharge of the causes of action against the acceptor; because a right of action for damages had vested at the time. In the case of *Beaumont v. Greathead*, 2 C. B. 494 (E. C. L. R. vol. 52), the debt had been paid by one who was jointly liable on the note with the defendant, before the commencement of the action. In *Thame v. Boast*, the payment was after the commencement of the action; but it was accepted in satisfaction of the debt *and costs*; therefore the plaintiff was not entitled to go on for nominal damages. I also think we have no power

to reduce the damages. There is nothing on the record to show that the bill was accepted by the defendant for the accommodation of Turner. I therefore think that, in this stage of the proceedings, we have no power to interfere.

The rest of the court concurring,

Rule refused.

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\*DOE d. PANTON v. ROE. April 28. [\*267

The court refused to grant a rule nisi for judgment against the casual ejector, where two terms had been allowed to elapse since the service of the declaration and notice,—although it was sworn that the delay had been caused by negotiations between the parties with a view to the settlement of the action; it not appearing that there would be any difficulty in serving the tenant again.

THE declaration in this case, which was a country cause, was served in September, 1851. In the following November, application was made to the tenant to attorn and pay rent to the lessor of the plaintiff, which he at first promised to do, and the proceedings in the ejectment were consequently suspended. The negotiations between the parties for a settlement of the action continued until the 24th of March last, when they were ultimately broken off, the tenant refusing to attorn.

*Power* now moved, after the lapse of two terms, for judgment against the casual ejector. He cited *Doe d. Crooks v. Roe*, 7 Jurist, 970, where a declaration in ejectment had been served more than two terms, but the proceedings had been suspended in consequence of a Chancery suit in relation to the same subject, and, there being no prospect of the termination of the Chancery suit, the court, on service of notice of intention to proceed with the ejectment, granted a rule nisi for judgment against the casual ejector. [JERVIS, C. J.—That is a different case.] The principle is the same: it is enough if it is shown that the landlord is acting *bonâ fide*. [JERVIS, C. J.—In *Doe d. Fell v. Roe*, 1 Dowl. N. S. 777, Coleridge, J., granted a rule where the delay (of one term) had arisen from negotiations which had been pending down to so late a period of the term that the application could not be made in time. But here the lessor of the plaintiff has been guilty of great laches.] It can hardly be called laches to delay proceeding from indulgence to the tenant.

\*JERVIS, C. J.—If it had been shown that the delay had fairly arisen from negotiations pending between the parties, and that the lessor of the plaintiff had been prejudiced,—as, for instance, from the tenant's having run away,—there might be some reason for granting a rule. But, as the tenant may be served again, I think the plaintiff ought to be left to that course. [\*268

The rest of the court concurring,

Rule refused.



DOE d. ROBERTS v. MOSTYN. *April 20.*

A local enclosure act (51 G. 3, c. cxviii.) appointed a commissioner, with power to make allotments in the usual manner, and provided, that, in case the commissioner should die, or become incapable of acting, &c., another should be appointed in his place, by a majority in value of the commoners present at a meeting to be held in the manner therein mentioned; and a subsequent section enacted that the award should be made within *six years* from the passing of the act:—Held, that an award made *nineteen years* after the passing of the act, and purporting to be made by a commissioner other than the commissioner appointed by the act, was good,—notwithstanding the lapse of time, and notwithstanding there was no proof of the due appointment of the commissioner by whom it was made,—the statute being directory only with regard to the time of making the award.

THIS was an action of ejectment brought to recover the possession of certain land in the parish of Llanarmon, in the county of Denbigh. The cause was tried before Williams, J., at the last assizes at Ruthin.

In the year 1811, an act (51 G. 3, c. cxviii.) passed “for enclosing lands in the parishes of Llanarmon, Llandegla, and Bryneglwys, in the counties of Denbigh and Flint.” By s. 1, it was enacted “that John Calvey, of Stapleford, in the county of Chester, and his successors, to be appointed in manner hereinafter mentioned, should be, and he was thereby, appointed the commissioner for setting out, dividing, and allotting the said several commons and waste lands in the said several parishes of Llanarmon and Llandegla, and that Walter Jones, of Cefn Rug, in the county of Merioneth, and his successors, to be appointed \*269] in manner hereinafter \*mentioned, should be, and he was thereby appointed the commissioner for setting out, dividing, and allotting the said several commons and waste lands in the said parish of Bryneglwys, and respectively for putting that act into execution.

S. 3 provided, that, if either of the commissioners so appointed, or any of their respective successors, should die, or become incapable of acting, &c., before all the powers vested in them by that act, and the general enclosure act of 41 G. 3, c. 109, should be completely executed, a proper person or persons should be appointed commissioner or commissioners in the place and stead of any such commissioner or commissioners so dying or becoming incapable of acting, &c., by a majority in value of the commoners present at a meeting to be held in the manner therein mentioned.

Ss. 20 and 21 direct the commissioners respectively to make allotments to the several proprietors of lands within the several parishes,—allotments to tenants for life and in fee-simple to be distinct.

S. 25 provided, “that, if any person hath sold, or shall at any time before the execution of the said awards respectively, or either of them, sell his or her right, interest, or property in, over, or upon the lands and grounds hereby intended to be divided, allotted, and enclosed, or any part thereof, to any other person, then and in every such case it shall be lawful for the said commissioners respectively, and they are

hereby respectively authorized and required, within their said respective parishes, to make an allotment of land unto the vendee or purchaser, or to his or her heirs and assigns, for and in respect of such right, interest, and property so sold."

S. 26 enacted that all and singular the commons, heaths, and waste grounds, which should be allotted under and by virtue of the act, should, immediately after such allotments were made, be held by and be subject \*to such and the same tenures, customs, hereditaments, rents, [\*270 and services, as the several and respective messuages, buildings, lands, tenements, and hereditaments, in respect whereof such allotted lands should be made, were then subject to.

S. 34 empowered proprietors to borrow money on their respective allotments, to defray their respective shares of the costs, charges, and expenses of obtaining and carrying the act into execution.

And s. 37 enacted "that two awards and two maps or plans, in the manner and form prescribed by the recited act (41 G. 3, c. 109), shall be made *within the space of six years* from the passing of this act, that is to say, one by the said John Calveley as to the commons and waste lands in the said parishes of Llanarmon and Llandegla, and the other by the said Walter Jones as to the said commons and waste lands in the said parish of Bryneglwys; and that the said awards, when enrolled in manner directed by the said recited act, shall be deposited at the places hereinafter mentioned, that is to say, the awards for the said parishes of Llanarmon and Llandegla, in the parish churches of the same last-mentioned parishes respectively, and the award for the said parish of Bryneglwys, in the parish church of the same last-mentioned parish; and duplicates thereof shall also be deposited in the office of the clerk of the peace for the county of Denbigh, for the perusal of all persons interested therein."

One John Roberts became entitled to an allotment under this act, in respect of his commonable rights in the parish of Llanarmon, and sold them to Sir Thomas Mostyn, the defendant's ancestor. This action was brought by the son of the allottee, who claimed to be entitled under a marriage settlement.

It appeared that John Calveley, the commissioner named in the act, died in the year 1819. There was no \*evidence of the appointment of a new commissioner: but the award for the parishes of [\*271 Llanarmon and Llandegla, which appeared to have been made in the year 1830, purported to be made by one Hughes, who had acted as surveyor under the act. A witness who was called on the part of the lessor of the plaintiff proved, that, after Calveley's death, Hughes went on with the business of the allotment.

It was objected, on the part of the defendant, that the award was not admissible, on the grounds, that there was no proof of the due appointment of Hughes as a commissioner, and that the commissioner was not

appointed, or the award made, within the six years limited by the 37th section of the statute.

A verdict was taken for the lessor of the plaintiff, subject to a motion to enter a verdict for the defendant, or a nonsuit, if the court should think either of the above objections well founded.

*R. V. Williams* now moved accordingly.—He submitted that the award was inadmissible in evidence, without proof that it was made within the time limited by the enclosure act, and by a commissioner duly constituted pursuant to the 37th section. [JERVIS, C. J.—The question is whether the act is imperative in that respect, or only directory.] It is impossible to give any effect to it, without holding it to be imperative. [JERVIS, C. J.—The contrary was decided in *Doe d. Nanney v. Gore*, 2 M. & W. 320:† there, a local enclosure act empowered the commissioner, by deeds, executed in the presence of and attested by two witnesses, to sell such portions of the waste lands as should be necessary to defray the expenses of carrying the act into execution, before award made: in ejectment by a party claiming under a conveyance from the commissioner in pursuance of such power, it \*272] appeared that the lessor of the plaintiff \*purchased the land with the view of exchanging it with the defendant; that he never took possession of it; and that the defendant, some years after the conveyance, fenced it in, and had occupied it by his tenants ever since, a period of less than ten years: it did not appear that any award had been made under the enclosure act: and it was held, that the plaintiff was not bound, in order to recover in the ejectment, to prove that the commissioner had duly qualified, and given the notices, &c., required by the general enclosure act, before the execution of the conveyance. WILLIAMS, J., referred to *Farrer v. Billing*, 2 B. & Ald. 171.] There would be no means of compelling the new commissioner to make an award, seeing that he must have been appointed after the six years limited for the making of the award had elapsed. [JERVIS, C. J.—By the general enclosure act, the allotments are vested in the parties before award made: would all these be avoided by some informality in the making the award?] That difficulty is now got over by the 3 & 4 W. 4, c. 87.(a)

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. The first objection is disposed of by *Doe d. Nanney v. Gore*, 2 M. & W. 321.† The only other question is, whether the 37th section of the local enclosure act is imperative or merely directory as to the time within which the award was to be made. I am clearly of opinion that it is directory only. The general enclosure act empowers allottees to take possession and to dispose of their allotments, notwithstanding

(a) By the 8 & 9 Vict. c. 118, s. 152, the commissioners are empowered to remedy defects and omissions in awards under local acts of enclosure: by s. 153, they may renew powers under local enclosure acts lost by lapse of time or otherwise: and by s. 154, the commissioners may appoint persons to complete proceedings in an imperfect enclosure.

\*the award has not been made. Unless the words of the act were so manifestly clear to the contrary, the court would always [273 incline to hold them to be directory, in order to avoid the absurdity and injustice that would result from any other construction. But here the words are plain enough. The award being made afterwards, the title becomes perfect.

CRESSWELL, J.—I am of the same opinion. These statutes are not like ordinary submissions to arbitration, where there is a proviso that the award shall be made by a given day. In that case, the award must be made within the prescribed period. Here, however, the language of the 37th section, from the very nature of the thing, must have been meant to be directory only.

The rest of the court concurring,

Rule refused.

\*HEAP v. BARTON and Another. April 30. [274

An ejectment was brought for the recovery of certain premises, on the 8th of February: on the 19th, the defendants allowed judgment to go by default, upon the lessor of the plaintiff entering into the following agreement:—"In consideration of Messrs. J. & G. B. (the tenants) not appearing to this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next."

Held, that the defendants were by this agreement precluded from removing fixtures put up by them on the premises, in the interval between the 19th of February and the 25th of March,—the fair construction of the agreement being, that the premises should be given up in the same state they were in on the day judgment was signed.

*Quære*, as to the right of a tenant to remove fixtures after the expiration of his term, where he still continues in actual possession of the premises, whether by wrong, or with the landlord's consent.

THIS was an action of trespass for breaking and entering the plaintiff's close, and carrying away gates, doors, harness-rooms, horse-boxes, partitions, racks, mangers, boskins, chimneys, &c.

The material plea was the third, which denied the plaintiff's property in the articles enumerated in the declaration.

The cause was tried before Cresswell, J., at the last assizes at Liverpool, when the following facts appeared in evidence:—The plaintiff was heir-at-law of one William Heap, who was the mortgagee of the premises in question, under an indenture bearing date in 1821. The mortgagor, who had been allowed to remain in possession, in 1842, let the premises to the defendants at the yearly rent of 30*l*. In 1845, the plaintiff gave the defendants notice of the mortgage, and required them to pay the rent to him; and they thereupon attorned to him, and continued to pay him the rent down to the year 1851, when they disclaimed holding under him. On the 4th of February in that year, the plaintiff demanded possession of the premises, and served the defendants with a declaration in ejectment on the 8th, the day of the demise being the 5th. On the 19th, the following agreement was entered into

between the plaintiff and the defendants, and signed on behalf of the former by his attorney :—

\*275] “In consideration of Messrs. John and George Barton \*not appearing to this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next.”

In consequence of this undertaking, the defendants suffered judgment to go by default, and remained in possession of the premises until the 24th of March, when they quitted, having previously, viz. in the interval between the 19th of February and the 24th of March, removed the articles enumerated in the declaration, which were all tenant's fixtures, and had all been affixed to the premises by the defendants during their term. The judgment in ejectment was proved at the trial; but no writ of possession had been executed.

The learned judge intimated an opinion that the removal of the fixtures was wrongful, and directed a verdict to be entered for the plaintiff on the third issue; but reserved leave to the defendants to enter a verdict for them on that issue, if the court should be of a different opinion.

*Knowles*, on a former day in this term, obtained a rule nisi accordingly.—He referred to *Penton v. Robart*, 2 East, 88, *Minshall v. Lloyd*, 2 M. & W. 450,† *Mackintosh v. Trotter*, 3 M. & W. 184,† *Weeton v. Woodcock*, 7 M. & W. 14,† and *Lee v. Risdon*, 7 Taunt. 188 (E. C. L. R. vol. 1),—submitting that the tenant's right to remove the fixtures continues during the whole time he remains in possession of the premises.

*Atherton* and *J. Brown* now showed cause.—The right of a tenant to remove fixtures must be exercised by him before the expiration of his term. Parke, B., in giving the judgment of the Court of Exchequer in *Hallen v. Runder*, 1 C. M. & R. 266, 275,† says: “When chattels \*276] are fixed to the freehold by a tenant, they become part \*of it, subject to the tenant's right to separate them *during the term*, and thus re-convert them into goods and chattels, as stated by Lord Chief Justice Gibbs in *Lee v. Risdon*, 7 Taunt. 191 (E. C. L. R. vol. 1).” The same doctrine is very clearly laid down, by Alderson, B., with a slight modification, in *Weeton v. Woodcock*, 7 M. & W. 14, 19:† “The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises *under a right still to consider himself as tenant*. That was the rule on which this court acted in *Minshall v. Lloyd*, 2 M. & W. 460,† in which Parke, B., in giving his judgment, puts it on the ground that there was ‘no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants.’ In the present case, also, this boiler was removed after the

entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants." Here, the defendants had clearly no right to consider themselves as tenants at the time they removed the fixtures in question. The memorandum of the 19th of February was intended merely to protect them from molestation, and to prevent their being treated as trespassers in the interval between that day and the 25th of March,—nothing more. This was the construction which was put upon a similar memorandum in *Fitzherbert v. Shaw*, 1 H. Bl. 258. There, the defendant had from the year 1765 been tenant from year to year of certain premises, which in 1787 were purchased by the plaintiff, who, soon after having given notice to quit, brought an action against the defendant to obtain possession. In March, 1788, the parties entered into an agreement, \*amongst other things, that judgment should be signed for the (lessor of the) plaintiff in the [\*277 ejectment, with a stay of execution till the Michaelmas following, till which time the defendant was to continue in possession. In this agreement, no mention was made of any buildings or fixtures. In case, in the nature of waste, against the defendant for carrying away certain fixtures and erections between the time of entering into the agreement and the ensuing Michaelmas, upon a motion for a new trial, the court said "it was not necessary to go into the general question as to the right of a tenant to remove buildings, &c.; since the fair interpretation of the agreement was, that, as the defendant was to remain in possession for a certain time after that agreement was entered into, and judgment signed in the ejectment, he should do no act in the mean time to alter the premises, but should deliver them up in the same situation as they were in when the agreement was made and judgment signed." [WILLIAMS, J.—The agreement postpones the evil day: but, when it comes, it comes with all its consequences.] That is the fair effect of it. The case of *Thresher v. The East London Water Works Company*, 2 B. & C. 608 (E. C. L. R. vol. 9), 4 D. & R. 62, shows, that, by leaving fixtures upon the premises at the expiration of the term, the tenant abandons them to his landlord. Under some circumstances, the courts have sanctioned the removal of fixtures after the tenancy is at an end. The strongest case upon the subject, is *Penton v. Robart*, 2 East, 88, which is observed upon in the notes to *Elwes v. Mawe* (3 East, 38), in 2 Smith's Leading Cases, 118 et seq., but which would probably not be upheld at the present day. Subsequent cases seem to have placed the doctrine upon a more satisfactory footing: *Davis v. Jones*, 2 B. & Ald. 165; *Minshall v. Lloyd*, 2 M. & W. 450;† *Lyde v. Russell*, 1 B. & Ad. 394 (E. C. L. R. vol. 20). In the last-mentioned case, Lord Tenterden, in giving the judgment of the \*court, says: "In a very excellent treatise on the law of fixtures, by Mr. Amos and Mr. Ferrard [\*278 (p. 87), it is laid down that a tenant must use his privilege in removing fixtures *during the continuance of his term*; for, if he forbear to do so,

within this period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord: and the following authorities are cited:—In the Year Book, M. 20 H. 7, fo. 13 b, pl. 24, the court, speaking of the furnaces set up by a lessee for years, say, ‘*during his term* he may remove them: but, if he permit them to remain fixed to the soil *after* the end of his term, then they *belong* to the lessor.’ And the dictum of Kingsmil, J., in T. 21 H. 7, fo. 27 a, pl. 4, is to the same effect. In like manner, in Poole’s Case, 1 Salk. 368, it was said by Lord Holt, that, ‘*during the term* the soap-boiler might well remove the vats; but, after the term, they became a gift in law to him in reversion, and are not removable.’ According to these authorities, then, the property in fixtures, which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term.” [JERVIS, C. J.—Is there any authority for what is said by Mr. Ferrard about the voluntary relinquishment? May not the rule be this, that the fixtures are the landlord’s, subject to the tenant’s right to remove them during the term? Suppose the landlord to be a tenant for life, could the tenant, on his death, remove the fixtures?] The law gives a reasonable time for the removal, where the duration of the tenancy is uncertain.

*Knowles and Cowling*, in support of the rule.—There is no such general rule of law as that which is supposed to have grown up out of the dicta in the Year Books of 20 and 21 H. 7, and in Poole’s Case. The tenant has an undoubted right to remove fixtures so long as he remains in possession of the premises. For this, *Penton v. Robart*, 2 East, 88, is a distinct authority. There, the removal of fixtures by a tenant was justified, after the expiration of the term, and after there had been a recovery in ejectment against him, he remaining in possession of the premises. “The old cases,” said Lord Kenyon, “upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but, in modern times, the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Here, the defendant did no more than he had a right to do; he was, in fact, *still in possession of the premises* at the time the things were taken away, and therefore there is no pretence to say that *he had abandoned his right to them*.” [JERVIS, C. J.—It seems to me that there is a view of this case which gets rid of the discrepancy between *Penton v. Robart* and some of the other cases. The tenants here disclaimed: they became trespassers.] Parke, B., in *Mackintosh v. Trotter*, 8 M. & W. 184,†—where it was held that a lessee cannot, even during his term, maintain trover for fixtures attached to the freehold,—says: “*Minshall v. Lloyd* is a direct authority on this point. I gave my opinion in that

case, not on my mere impression at the time, but after much consideration of this point,—that the principle of law is, that whatsoever is planted in the soil belongs to the soil,—*quicquid plantatur solo, solo sedet*; that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an *excrecence* on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my \*Brother Alderson go; and I think it was a correct decision." The tenant's right to remove fixtures subsists so long as [280 the landlord allows him to remain in. [JERVIS, C. J.—You must go further, and say that it subsists as long as the tenant chooses to remain in possession in defiance of his landlord.] *Penton v. Robart* has been frequently cited, and has never yet been overruled, or even doubted. The mere circumstance of the party's having no right to the possession, cannot be the true test. The disclaimer here is of no use, except to show that the original tenancy was at an end; the landlord gets no possession, makes no entry. It is true he was taking steps to treat the tenants as trespassers. There is nothing in the agreement of the 19th of February to show the intention of the parties that the fixtures should not be afterwards removed by the tenants: there is no implied undertaking that the premises shall be delivered up on the 25th of March in the precise condition in which they stood on the 19th of February. The agreement in *Fitzherbert v. Shaw* is not very fully stated. Here, express consideration is given for the defendant's remaining in possession: that being so, the court can infer no other consideration than that expressed, or that which manifestly flows from what is expressed. Suppose a valuable fixture put up after the expiration of the term,—could that be removed under such an agreement as this?

JERVIS, C. J.—I am of opinion that this rule must be discharged. The general principle which has been so elaborately discussed, is one of great interest, and not without difficulty. The courts seem to have taken three separate views of the rule,—first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—secondly, as in *Penton v. Robart*, 2 East, 88, that the tenant may remove the fixtures notwithstanding \*the term has expired, if he remains in possession [281 of the premises,—thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz. that the tenant continues to hold the premises under a right still to consider himself as tenant. It is unnecessary for us on the present occasion to intimate any opinion as to either of these positions; because I think the fair effect of the agreement of the 19th of February, precluded the defendant's right to remove the fixtures in question. The intention evidently was, that the plaintiff should suspend his remedy for obtain-



ing possession of the premises until the 25th of March, in consideration of the defendants' then giving them up in the same condition as they were in at the time of making that agreement. If the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so. I am glad to find that this has been ruled to be the proper effect of such an agreement, in a former case of *Fitzherbert v. Shaw*, 1 H. Bl. 258. That is quite decisive of the matter: and therefore, on this short ground, I think this rule must be discharged.

CRESSWELL, J.—As we are not called upon to decide the general question which has been discussed, it is unnecessary to say more than that I concur in the opinion which has been expressed by the Lord Chief Justice.

WILLIAMS, J.—I am of the same opinion. I think it is quite impossible to give this agreement any other meaning than that which was given to an agreement almost identical in terms with it, in *Fitzherbert v. Shaw*. The defendants having consented that judgment in the ejectment should be signed against them, the usual consequences followed, viz. that they remained in as \*trepassers, subject to the plaintiff's undertaking not to issue a writ of possession until a given day.

TALFOURD, J.—I am entirely of the same opinion. Independently of authority, I should have felt no difficulty in arriving at the conclusion the court has arrived at, upon the construction of this undertaking. At the same time, I am happy to find that there is a case so completely in point as that of *Fitzherbert v. Shaw*.

Rule discharged.

END OF EASTER TERM.

CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
IN  
Easter Vacation,

IN THE  
FIFTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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The Judges who sat in Banco during this Vacation were :

MAULE, J.  
CRESSWELL, J.

WILLIAMS, J.  
TALFOURD, J.

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KELLY, Appellant, WEBSTER, Respondent. *May 11.*

In consideration that A., who was tenant of a messuage and premises under a parol agreement for a seven years' lease, would give up the immediate possession thereof to B., in order that B. might enter thereon as tenant, and also as a compensation for certain improvements made by A. on the premises, and for the value of certain articles left thereon by A.,—B. agreed to pay A. 100*l.*

A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.; and B. afterwards, in part performance of the agreement on his part, paid A. 51*l.*

In an action brought by A., in the county court, to recover the balance of the 100*l.*,—the judge ruled that the contract in respect of which the plaintiff sued was not a contract for the sale of an interest in or concerning lands, within the 4th section of the 29 Car. 2, c. 3:—The court, on appeal, reversed his decision.

THIS was an appeal against a decision of the judge of the county court of Yorkshire, holden at Leeds.

The action was brought to recover 49*l.*, stated in the plaintiff's particulars of demand annexed to the summons, to be due to him from the defendant for "balance due to me from you of a sum of 100*l.*, in consideration of my giving up possession to you of a messuage or \*dwelling-house and premises situate in Wellington Street, Leeds, [284 on the 6th of July, 1850, and for the valuation of certain vene-

tian blinds, passage-lamp, and partitions therein contained, and certain papering, painting, and other improvements made by me in the said house."

The facts, as proved at the trial, were, that the defendant occupied, as yearly tenant, a house on the south side of Wellington Street, in Leeds, which he kept and used as a beer-shop. The landlord, being desirous of pulling down the house, gave the defendant notice to quit it. The plaintiff occupied, as a private dwelling-house, a house on the opposite side of the same street, at a rental of 86*l.* per annum, as tenant to one James Holdforth, under a parol agreement for a lease for seven years, commencing in July, 1849: but no lease was ever executed.

In or about the month of May, 1850, the plaintiff being desirous to quit the last-mentioned house, the defendant applied to the plaintiff to let him have the house. The plaintiff thereupon wrote to Mr. Holdforth, the owner of the house, the following letter:—

"14, Wellington Street, 6th May, 1850.

"Dear Sir,—From unforeseen circumstances, I find I shall be obliged to remove to Kirkstall, to take the management of our mill, much against my own inclination. I have shown the house to three or four different parties, and all complain both of the rent for the situation, and very noisy. It is my opinion that it will answer your purpose better to let it as an inn; and I think the bearer would give perhaps 50*l.* per year, or more, if tried. If you think proper to accept him as tenant, please to say so, that I may make arrangements accordingly, as I find he wishes to enter to it in three weeks' time. I can only add my sorrow \*285] for leaving it, after \*getting it into such nice order, and laying out what I have done on it.

"Yours, &c., S. P. WEBSTER."

The defendant applied to Mr. Holdforth to let him the house, to be used by him for the purposes of a beer-shop; and, as Mr. Holdforth appeared to have no objection to do so, on certain terms, a verbal agreement was, after some negotiation, come to between the plaintiff and defendant, on the 4th of July, 1850, that the defendant should pay to the plaintiff the sum of 100*l.*, in consideration that the plaintiff would give up immediate possession of the house to the defendant, in order that the defendant might enter on it as Mr. Holdforth's tenant, and also as compensation for the improvements made by the plaintiff, and for the value of the articles mentioned in the particulars of the plaintiff's demand.

Mr. Holdforth and the plaintiff agreed that the plaintiff should quit his possession of the house, on payment of the rent then due; and Mr. Holdforth and the defendant agreed that the latter should become the tenant, at an advanced rent of 50*l.*: and, accordingly, in pursuance of this arrangement, on the 6th of July, 1850, the plaintiff gave up the key to Mr. Holdforth's agent, and paid him the rent up to that time; and Mr. Holdforth's agent then and there delivered the key to the

defendant, who has occupied the house from that time to the commencement of this action.

About ten days after the 6th of July, the defendant paid to the plaintiff 51*l.*, in part of the sum of 100*l.*, and this action was brought to recover the balance, of 49*l.*

The agreement between the plaintiff and defendant, of the 4th of July, 1850, on which this action was brought, was not, nor was any memorandum or note thereof, in writing.

\*It was objected, on the part of the defendant, that this action was brought upon a contract for the sale of lands, tenements, or hereditaments, or some interest in or concerning them, and that it could not be maintained on a verbal agreement. [\*286

The judge overruled the objection, and ruled and determined that the plaintiff was entitled to recover, and accordingly gave a verdict for the plaintiff for 49*l.*

There was no evidence of an account stated; the defendant having always alleged that the 51*l.* which he had paid was all that he had agreed to pay.

The question for the opinion of the Court of Common Pleas, was, whether the ruling and determination of the judge of the county court, that this action could be maintained on the verbal agreement of the 4th of July, was correct in point of law.

If the court of appeal should be of opinion that such ruling and determination were incorrect in point of law, then the said court might set aside the verdict entered for the plaintiff, and make such other order thereupon as the said court might think proper.

*Udall*, for the appellant.—This action is clearly founded upon an agreement for the sale of an interest in or concerning lands, tenements, or hereditaments, within the meaning of the 29 Car. 2, c. 3, s. 4. The first part of the claim in the particulars is disposed of by the case of *Cocking v. Ward*, 1 C. B. 858 (E. C. L. R. vol. 50). There, a count in assumpsit stated that A. was the occupier of a farm, as tenant to one V.; that B., the defendant, was desirous of renting the farm from V., and had applied to and requested A. to surrender and relinquish possession thereof to V., and to endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that, in consideration that A. would surrender and relinquish possession of the farm to V., and \*would also apply to V., and endeavour to prevail upon him to accept of such surrender, and to accept B. as [\*287 tenant in lieu of the plaintiff, B. promised to pay A. 100*l.* when he should become such tenant. It then averred that A. did surrender and relinquish, &c., and did apply to and endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that V. accepted the surrender, and accepted B. as tenant; but that B. refused to pay the 100*l.* It was held that this was a contract for

an interest in or concerning lands, and therefore that the special count could only be proved by a note or memorandum in writing, in conformity with the 4th section of the statute of frauds. It was further held, that A. was entitled to recover the 100*l.* upon a count on an account stated, upon proof that B. had, since he obtained possession of the farm, acknowledged his liability, and promised to pay that sum. The latter part of the decision, however, is not applicable here; for, there was no evidence of an account stated. The rest of the claim, for papering, painting, and improvements, according to the case of *The Earl of Falmouth v. Thomas*, 1 C. & M. 89,† 8 Tyrwh. 26, cannot be recovered under the special count.

*Hall*, for the respondent.—This was not a contract or agreement for or relating to the sale of an interest in or concerning lands, tenements, or hereditaments, within the 4th section of the statute of frauds. The transaction was a mere arrangement for the plaintiff's giving up possession of the premises, in order that his landlord and the defendant might make a new agreement in respect of them, and not, as in *Cocking v. Ward*, substantially an agreement to assign. [WILLIAMS, J., referred to *Dodd v. Acklom*, 6 M. & G. 672 (E. C. L. R. vol. 46), 7 Scott N. R. 415.] That was a case of surrender. Here was a complete performance \*288] of the contract on the one side, and a part \*performance on the other: and the statute has been held not to apply in the case of *executed* contracts,—*Inman v. Stamp*, 1 Stark. N. P. C. 12 (E. C. L. R. vol. 2); *Souch v. Strawbridge*, 2 C. B. 808 (E. C. L. R. vol. 52). In *Seaman v. Price*, 2 Bingh. 437 (E. C. L. R. vol. 9), 10 J. B. Moore, 84 (E. C. L. R. vol. 17), 1 C. & P. 586 (E. C. L. R. vol. 12), the plaintiff, having orally bargained with J. E. for the sale of some houses, sold the bargain to the defendant for 40*l.*; and J. E., at the request of the defendant, conveyed the premises to P., who was not a trustee for the defendant. A verdict having been found for the plaintiff, in an action for the recovery of this 40*l.*, the court refused to enter a nonsuit, which was moved for on the grounds,—first, that the oral bargain for the interest in the houses could never have been enforced, and therefore could not form the consideration of an assumpsit,—secondly, that the houses had never been conveyed to the defendant. Best, C. J., said: "Though there was no legal obligation in J. E. to convey, yet the defendant has in fact enjoyed all the advantage of this agreement, and that forms a moral obligation sufficient to support the promise." So far, at all events, as relates to the fixtures, the case is clearly not within the statute. In *Hallen v. Runder*, 1 C. M. & R. 266,† A. having occupied a house as tenant to B., in which there were certain fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy, agreed, at B.'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation to be made by two brokers. A., at the expira-

tion of his tenancy, delivered up possession of the house to B., leaving the fixtures on the premises. On the following day, the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. A. having brought indebitatus assumpsit for the price and value of fixtures, &c., bargained and sold, and for fixtures \*sold and delivered, it was held that the action was [\*289 maintainable, and that this was not a sale of an interest in land within the 4th section of the statute of frauds. [CRESSWELL, J.—That was a mere waiver of the tenant's right to remove the fixtures, in consideration of the landlord's agreeing to pay for them according to a valuation to be afterwards made.] In *Buttemere v. Hayes*, 5 M. & W. 456,† the plaintiff was by the agreement parting with an interest in a term. Parke, B., says: "Perhaps, if the declaration had stated an agreement to relinquish the possession merely, it might not have amounted to a contract for an interest in land: but it goes on to allege that the plaintiff was to suffer the defendant to become tenant thereof for the residue of the term. Now, he could not have become tenant for the residue of the term, except by an assignment; and that would be a contract for an interest in land within the statute, and ought to be reduced into writing."(a) [MAULE, J.—If it *relates* to a sale of an interest in lands, &c., the agreement is within the statute. Here, the plaintiff, by virtue of his agreement with his landlord, was entitled to an equitable interest in the land for the seven years. A sale of that interest clearly is within the statute. Is not this in substance an agreement for that? The plaintiff contracts to part with his equitable title to the seven years' lease.(b)] The plaintiff does not affect to transfer that supposed equitable interest to the defendant; nor does the defendant take any such interest from him. [MAULE, J.—The plaintiff has an interest in land, and he parts with it for a pecuniary consideration.] Not to the defendant. [MAULE, J.—The statute of frauds does not \*contemplate this or that mode of [\*290 conveyance: it looks to the substance of the thing.]

*Udall*, in reply.—This is an action upon the agreement; and the paramount object of the agreement was, that the plaintiff should divest himself of the interest he had in the premises, in favour of the defendant. It is impossible to distinguish the case from that of *Cocking v. Ward*.

MAULE, J.—Where anything is done which substantially amounts to a sale or parting with an interest in land, the contract is "for or relating to the sale of an interest in or concerning lands, tenements, or hereditaments," within the 4th section of the statute of frauds. After the decision of this court in *Cocking v. Ward*, I think it is impossible to say that the ruling of the judge of the county court was right.

The rest of the court concurring, Appeal allowed, with costs.

(a) See the cases collected in Chitty on Contracts, 4th edit. pp. 267—271.

(b) The case describes this agreement as a "parol agreement:" in truth, it was an agreement not in writing, and therefore not capable of being enforced in equity.

\*291] \*CAWLEY, Appellant, FURNELL and Another, Respondent.  
June 21, 1851.

An appeal will lie against the decision of a county court judge, under the 13 & 14 Vict. c. 61, s. 14, though the question presented to the court of appeal be a mixed question of law and fact,—provided the court can clearly see, that, in coming to the conclusion he did, the judge of the county court *must* have taken an erroneous view of the law.

The following letter addressed by the defendant to the plaintiff, within six years, respecting a debt otherwise barred by the statute of limitations, was held (on appeal) not a sufficient acknowledgment of the debt to take the case out of the statute:—"I am much surprised at receiving a letter from H. (the plaintiff's attorney) this morning, for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. (one of the plaintiffs) was in town."

THIS was an appeal against a decision of the judge of the county court of Dorsetshire.

The action, which was on contract, was tried on the 30th of November, 1850. Neither party demanded a jury. The action was for goods sold and delivered by the plaintiffs below to the defendants below, Edward Cawley and Joseph Cawley, in the year 1842, to the amount of 50*l.* 16*s.* 5*d.*, which, after giving credit to the defendants below for goods sold and delivered by them to the plaintiffs below to the amount of 16*l.* 4*s.* 4*d.*, left due to the plaintiffs below the sum of 34*l.* 12*s.* 1*d.*

The defendant Edward Cawley not having been duly served with the summons to appear, the action proceeded,—pursuant to the 68th section of the statute 9 & 10 Vict. c. 95,—against Joseph Cawley alone.

The defendant Joseph Cawley, by his attorney, admitted at the trial that the balance of 34*l.* 12*s.* 1*d.* was owing from the defendants to the plaintiffs, but relied on the statute of limitations for his defence, of which due notice had been given, pursuant to the 76th section of the statute.

To take the case out of the statute of limitations, the plaintiffs called a witness, Joseph Furnell, who proved, that, as agent of the plaintiffs, he had an interview with both the defendants in London, in the year \*292] 1844, \*when the plaintiffs' and defendants' accounts respectively were stated, and the balance of 34*l.* 12*s.* 1*d.* admitted by the defendants to be due to the plaintiffs; that the defendants then stated to the witness that it would be more convenient for them to pay in goods than money; that, in March, 1845, he had another interview with the defendant Joseph Cawley, and also with Edward Cawley, but not with both together, and applied again for the balance of 34*l.* 12*s.* 1*d.*, when Joseph Cawley stated that it would be more convenient to pay in goods than money, and proposed to meet him (the witness) at the Pantechnicon, in London, where the defendants had goods then deposited; that he accordingly met Joseph Cawley at the Pantechnicon on the day following, when he, Joseph Cawley, pointed out the goods

belonging to the defendants, and wrote a list of the goods, with the prices, in his, the witness's, book, and offered any of them in liquidation of the debt of the plaintiffs; that he, the witness, then and there agreed to take two bedsteads, one marked 20*l.* and another 15*l.* 10*s.*, subject to the plaintiffs' approval, and to be forwarded according to the plaintiffs' letter.

It was also proved by the defendant Joseph Cawley, that, when goods are deposited at the Pantechmicon, the charge upon them is not told to the depositors; but that, when the goods are sold, the charge upon them is then given.

Nothing was said at either of the above-mentioned interviews in London in 1845, about the charges at the Pantechmicon for the deposit of the goods there.

It was also proved, that, on or about the 1st of April, 1845, the plaintiffs addressed and sent by post the following letter to the defendant Edward Cawley:—

“Poole, April 1st, 1845.

“Mr. Edward Cawley,

“Sir,—Our Mr. Furnell was disappointed at your not \*meeting him on Saturday morning, as you proposed, and that you [\*293 did not call on him at Wood's Hotel on Monday morning. He, however saw Mr. Joseph Cawley on Saturday at the Pantechmicon, who agreed to forward us two bedsteads as a set-off against our account amounting to about 35*l.*, particulars of which were then given him,—one a half-tester bedstead, with white good chintz furniture, marked 18*l.*, the other a spiral four-post, with green damask furniture and a mattress, marked 22*l.* These you will please pack carefully, and deliver not later than Thursday week, the 10th instant (earlier, if possible), at Chamberlain's Wharf, to be forwarded to us by Messrs. Wanhill's Poole coaster. If this is not punctually complied with, we shall at once feel compelled to take steps unpleasant to all parties. You will please inform your brother of the subject of this letter, and advise us when the bedsteads are delivered at the wharf.

“FURNELL & JOYCE.”

No goods being sent, the plaintiffs instructed one Knight, an attorney, to apply for payment of the debt; who accordingly wrote to the two defendants.

In the month of April, 1845, the plaintiffs received by post a letter, which was put in evidence at the trial, and proved to the satisfaction of the judge of the county court to have been signed by the defendant Joseph Cawley. The following is a copy of the letter:—

“April 25th, 1845.

“Messrs. Furnell & Joyce,—I am much surprised at receiving a letter from Henry Knight this morning, for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you



in cash; but you may have any of the goods we have at the Pantech-nicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. Furnell was in town.

\*294] You are \*welcome to issue as many writs as you think proper: but, if you continue to press the thing, I shall immediately put myself under the protection of the court. My brother Edward has met with a very serious accident, and is unable to attend to anything.

“JOSEPH CAWLEY.”

Judgment was given for the plaintiffs, against which Joseph Cawley gave notice of appeal.

The question for the opinion of the court was, whether the action was barred by the statute of limitations, or whether the plaintiffs were entitled to judgment for 84l. 12s. 1d.

[The case was signed by the judge of the county court, but there was no statement therein that the parties had disagreed as to the facts; and the argument, by consent of the parties, took place before the full court, sitting in banco, in Trinity Term last.]

*Udall*, for the appellant.—Under the circumstances stated, the statute of limitations was a bar to the plaintiffs' claim. The goods were delivered in the year 1842. The letter of the 25th of April, 1845, which was relied upon to take the case out of the statute, was clearly insufficient for that purpose. [MAULE, J.—The defendant says he is unable to pay in cash; but he offers goods: there is a clear *acknowledgment* of the debt.] But no promise to pay. That is essential. In *Hart v. Pendergast*, 14 M. & W. 741,† the following letter, written by the defendant to a clerk of the plaintiff, in answer to an application for payment of the debt, was held not sufficient to defeat a plea of the statute of limitations, —“I will not fail to meet Mr. H. (the plaintiff) on fair terms; and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance.” Pollock, C. B.,

\*295] \*there says: “It is better to adhere to the principle of some decision, instead of reasoning on the terms of the particular document in each case. Now, the case of *Tanner v. Smart*, 6 B. & C. 608 (E. C. L. R. vol. 19), 9 D. & R. 549 (E. C. L. R. vol. 22), lays down the principle very clearly, on a review of all the authorities, viz. that, ‘under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and, unless it is conformable to and maintains the promise in the declaration, although it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect.’ It is not sufficient that the document contains a promise by the defendant to pay *when he is able*, or *by bill*, or a mere *expectation* that he shall pay at some future time: it should contain either an unqualified promise to pay,—that is, a promise to pay *on request*,—or, if it be a conditional promise, or a promise to pay on the arrival of a

certain period, the performance of the condition, or the arrival of that period, should be proved by the plaintiff." And Rolfe, B., said: "The principle is said to be, that the document must contain either a promise to pay the debt, or an acknowledgment from which such a promise is to be inferred. Perhaps it would be more correct to say, that it must in all cases contain a promise to pay, but that from a simple acknowledgment the law implies a promise; but there must, in all cases, be a *promise*, in order to support the declaration." So, in *Routledge v. Ramsay*, 8 Ad. & E. 221 (E. C. L. R. vol. 35), 3 N. & P. 819, J. R., a debtor, having sums due to him, handed the accounts to his creditor, and wrote—"I give you the above accounts, so you must collect them and pay yourself, and you and I will then be clear:" and it was held that this acknowledgment did not imply a promise to pay, and was no answer, under the 9 G. 4, c. 14, to a plea of the statute of limitations. And Patteson, J., said: "An acknowledgment, without anything more, may raise an implied \*promise since the statute 9 G. 4, c. 14, as it did [\*296 before. But, when something else is added, the effect of that must be taken into consideration." Again, in *Morrell v. Frith*, 8 M. & W. 402,† the following letter from the defendant to the plaintiff's attorney, was held not to be a sufficient acknowledgment of a debt to take the case out of the statute,—“Since the receipt of yours (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter.” And Parke, B., said: “The utmost that can be made of this letter, is, that it acknowledges the existence of the debt mentioned in the previous letters; but that the defendant does not mean to express any promise to pay, but reserves it for future consideration.” [MAULE, J.—Is this a case in which the statute 13 & 14 Vict. c. 61, s. 14, gives an appeal? See *The East Anglian Railways Company v. Lythgoe*, 10 C. B. 726 (E. C. L. R. vol. 70).] If there is any evidence to support the decision, this court probably will not interfere. But here there was no evidence which could have been submitted to a jury. The judge took upon himself to decide that the case was taken out of the statute of limitations. Neither of the other courts has adopted the view suggested by this court in the case of *The East Anglian Railways Company v. Lythgoe*. [MAULE, J.—The parties have mixed up the law and the facts together. In the case of an arbitration, the court will not meddle with the decision of the arbitrator, whether in fact or law.] To hold that an appeal lies only where the parties have thought fit to summon a jury, would be almost repealing the statute. The question here is clearly one of law.

*Barstow* (with whom was *Willes*), for the respondent.—\*Upon [\*297 the facts disclosed in this case, there has been no such error or miscarriage of the judge in point of law, as to give this court jurisdic-

tion to reverse his decision. The defendant might, if he chose, have had a jury; and, therefore, according to the impression thrown out by this court in *The East Anglian Railways Company v. Lythgoe*, the case is not properly within the 18 & 14 Vict. c. 61, s. 14. The decision, however, of the judge was clearly right; or, at all events, there was evidence to go to a jury, of a promise sufficient to take the case out of the statute of limitations. The case does not show when the cause of action accrued, or when the action was commenced. [JERVIS, C. J.—Upon whom lies the onus of showing that the case is taken out of the statute of limitations?] Upon the party who impeaches the decision of the judge. [CRESSWELL, J.—I think not. If we have no data to guide us, why are we to assume anything?] The difficulty thus thrown upon the respondent, fortifies the objection to this being a proper case for appeal at all. Assuming, however, that the onus of showing that the case is taken out of the operation of the statute of limitations rests upon the respondent, it is submitted that that which took place between the plaintiffs' agent and the defendant in 1844, according to the authorities, amounted to a payment on account. In *Ashby v. James*, 11 M. & W. 542,† in order to take the case out of the statute of limitations, the plaintiff tendered evidence, that, a short time before the action, he and the defendant met for the purpose of adjusting the accounts between them; that, on the plaintiff's demand being read over, the defendant said it was correct, but that he claimed a set-off; that his set-off was also investigated; and that finally a balance was struck in favour of the plaintiff of 12*l.* 9*s.* 6*d.* This evidence was objected to on the part of the defendant, on the ground that it amounted to a mere parol \*298] acknowledgment by \*him of the debt, which, by the express provisions of the 9 G. 4, c. 14, was not sufficient to take the case out of the statute. The evidence, however, was received, and the plaintiff had a verdict for 12*l.* 9*s.* 6*d.* Upon a motion for a new trial, on the ground that this evidence had been improperly received, Lord Abinger, C. B., said: "I think Lord Tenterden's act does not apply at all to the fact of an account stated, where there are items on both sides. This is not 'an acknowledgment or promise by words only;' it is a transaction between the parties, whereby they agree to the appropriation of items on the one side, item by item, to the satisfaction pro tanto of the amount on the other side. The act never intended to prevent parties from making such an appropriation." And Alderson, B., said: "The courts have never laid it down that an actual statement of a mutual account will not take the case out of the statute of limitations. They have, indeed, determined that a mere parol statement of, and promise to pay, an existing debt, will not have that effect, because, to hold otherwise, would be to repeal the statute. The truth is, that the going through an account with items on both sides, and striking a balance, converts the *set-off* into *payments*; the going through an account where

there are items on one side only,—as was the case in *Smith v. Forty*, 4 C. & P. 126 (E. C. L. R. vol. 19), does not alter the situation of the parties at all, or constitute any new consideration. Here, the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set off against the earlier items of the plaintiff's, leaving the case unaffected either by the statute of limitations or the set-off." That decision was approved of and acted upon by this court in *Clark v. Alexander*, 8 Scott N. R. 147, 165. It also met with the concurrence of the Court of Queen's Bench, in *Worthington v. Grimsditch*, 7 Q. B. 479, 484 (E. C. L. R. vol. 58), where Lord Denman says: "Where there are accounts \*with items on both sides, the going through them, and striking a balance, converts [\*299 the set-off into payment, as was said by Alderson, B., in *Ashby v. James*."

*Udall*, in reply.—The case distinctly states, that, "to take the case out of the statute of limitations, the plaintiffs called a witness," who proved so and so. That is a sufficient statement that, in the opinion of the judge, the debt was *prima facie* barred. (a) The authority of *Ashby v. James* is not disputed, in a case to which it is applicable. There can be no doubt, that, if there be a balance ascertained by an agreed set-off, it might be pleaded as an account stated; as in *Smith v. Page*, 15 M. & W. 688.† The evidence, however, does not warrant the application of that doctrine here. *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court.

This was an appeal from a decision of the judge of the county court of Dorsetshire. The cause was tried before the judge, without the aid of a jury. The case,—which seems to have been stated by the judge,—sufficiently showed that the debt claimed was either proved or admitted, and that the defendant relied upon the statute of limitations as a defence to the action. The question argued before us,—and which appeared to have been raised before the judge of the county court also,—was, whether or not the facts stated took the case out of the operation of the statute of limitations. The judge thought they did, and accordingly gave judgment for the plaintiffs.

A point which had on a former occasion,—*The East Anglian Railways Company v. Lythgoe*, \*10 C. B. 726 (E. C. L. R. vol. 10),—[\*300 occurred to me as one of difficulty, was raised by the counsel for the respondent on the argument of this case, viz. whether the statute 13 & 14 Vict. c. 61, contemplated an appeal from the decision of a county court judge when exercising the functions of both judge and jury, the more especially as there are no pleadings to separate the question of fact from the question of law. The solution of that difficulty

(a) The case, though signed by the judge, not showing that the parties had differed, must be taken to be the statement of *the parties*, and not of the judge. The court animadverted upon this irregular mode of stating the case.

depends upon the proper construction to be put upon the 14th section of that act, which provides, that, "if either party, in any cause of the amount to which jurisdiction is given to the county courts by that act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose," &c. The question here does not arise upon the admission or rejection of evidence. What is the meaning of these words,—“the determination or direction of the court in point of law?” The act clearly does not give an appeal in every case where a party is dissatisfied with the judgment of the court; but only where the dissatisfaction is with the determination or direction in point of law. A determination or direction in point of law, is, where a question is raised on demurrer or special verdict; and though such things are not, strictly speaking, in the county court, something may take place there which is substantially the same. For instance, suppose a claim made in a county court, which, upon the plaintiff's own showing, could not in law be sustained,—or, if it were a claim for money due upon a voluntary promise, without consideration, and the defendant were to object that such a claim could not be sustained in point of law; or, if the defendant, in answer to a claim of \*801] debt, were to \*rely for his defence upon the fact that the cause of action did not accrue within three years,—in each of these cases the determination of the court would be a determination in point of law. The term “direction” properly applies where the cause is to be determined by a jury, and the judge directs them in a matter of law,—as, that a certain interest can only pass by an instrument under seal, or the like. In all these cases, the statute gives an appeal. But, where the parties do not choose to separate the law from the facts, but leave the whole to be disposed of by the judge, it may well be doubted whether the case is within the spirit of the enactment in question. It is often most desirable that a decision should be final, and subject to no appeal; as, in the case of arbitrators, it has long been settled, that, where parties have selected one who is to put an end to all controversies between them, it is not competent to them to impugn his decision either as to the law or the facts: and it may very well be, that, where parties leave the whole law and facts to be determined by the judge of the county court, they may be considered as having elected to put him in the situation of an arbitrator. If it is said that this construction altogether disposes of the right of appeal, that objection may be answered by giving the words of the 14th section their reasonable import, and holding them to require a case where at least the law and the facts are separated from each other, so as to enable the court of appeal to see what the determination in point of law has been. It may be, that,

if, upon the case stated by the parties, or by the judge, it appears to the court of appeal that the decision which has been come to can be sustained by a particular view of the facts which does not render it necessary to arrive at the conclusion that he has erroneously decided the point of law before him, this court may have no power to review the judgment; yet, that, where it is manifest from the \*facts [\*302 stated, that, in order to arrive at the conclusion he has arrived at, the judge must have decided a matter of law in a certain way, that will be a determination in point of law, with respect to which an appeal will lie. So that, supposing there be a judgment which can be sustained, consistently with the law, by any view that can be taken of the facts stated, such a judgment probably cannot be reversed; yet, still, where the judge states the facts which were before him, and those facts will sustain his judgment upon one view of the law only, and that an incorrect one, this court may have jurisdiction to entertain the appeal. On the part of the appellant in this case, it was insisted that it falls within the latter description. And we incline to that opinion. We cannot see from the statement submitted to us how the judge could, consistently with a right view of the law, have come to the conclusion he has come to. We therefore think the appellant is entitled to our judgment.

It may be observed that this court of appeal is one of a very peculiar description. It is not one of the superior courts, but an anomalous sort of court composed of two or more of the puisne judges sitting as a court of appeal for the purpose of reviewing decisions of the county court. It is a court from which the Chief Justice and the Chief Baron are excluded, and which is incapable of holding its sittings in term.(a) It has power \*to determine the appeal, and to order a new [\*303 trial as it thinks fit, or to order judgment to be entered for either party, and to make such order as to the costs of the appeal as it thinks proper; and its orders are to be final. It is difficult to find any precise analogy for the proceedings of such a court. That which approaches the nearest to it, is, the power which is given to two or more judges to reverse the decisions of commissioners of taxes, in which case, instead of giving judgment at length, as in ordinary cases, it is customary simply to state that the judges are of opinion that the decision is right or wrong, as the case may be. We, therefore, think it convenient not to introduce the practice of giving the reasons for our judgments,—a practice which a very high authority is reported to

(a) Since altered by the 15 & 16 Vict. c. 54, s. 2, which repeals "so much of the 13 & 14 Vict. c. 61, s. 14, as limits the court of appeal to the puisne judges of the superior courts of common law at Westminster, and the sitting of the said court of appeal to a time out of term," and enacts that "all appeals now depending or hereafter to be brought before the said superior courts, shall be heard and determined in term by the judges thereof, as part of the ordinary business of such courts, or out of term by any two or more of the judges of the said superior court sitting as a court of appeal for that purpose."

have said to be sometimes very inconvenient and embarrassing. The observations I have thought it right to make, are made with reference to the question of our jurisdiction to entertain the appeal. In the present case we assume that we have jurisdiction. With regard to the merits, we are all agreed that the judge of the county court was wrong: we therefore order that the judgment of this court be entered for the defendant. As to the costs of the appeal, we make no order.

Appeal allowed, without costs.

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\*304] \*CUTHBERTSON, Clerk to the Commissioners for improving the Harbour of NEATH, Appellant; PARSONS, Respondent.  
May 11.

By an act for improving and maintaining a harbour, the commissioners were empowered to build or provide steam-tugs for towing vessels into or out of the harbour, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of certain steam-vessels to perform this duty for them at certain specified rates of charge; the commissioners paying them in addition a certain sum annually, and the vessels being placed under the direction and control of the harbour-master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of a tug, whilst being towed into the harbour, the owner brought an action in the county court against the harbour commissioners, and, under the direction of the judge, recovered a verdict:—The court, on appeal, set aside the verdict,—holding that the decision of the judge could not, upon any inference which could legitimately be drawn from the facts before him, be correct in point of law.

THIS was an appeal from a decision of the judge of the Glamorgan-shire county court.

The action in the court below was brought against the appellant as clerk to the commissioners for improving the port and harbour of Neath, who is liable to be sued as the nominal defendant on behalf of the commissioners, in pursuance of the 6 & 7 Vict. c. lxxi., intituled “An act for improving and maintaining the port and harbour of Neath, in the county of Glamorgan.”

The action was so brought by the respondent as the owner of a ship called the “Grace Darling,” against the appellant as such clerk, to recover damages from the harbour commissioners for an injury done or occasioned to the said ship of the respondent, on the 28th of February, 1851, by the negligence, carelessness, and want of skill of certain persons alleged to be the agents and servants of the said harbour commissioners. The particulars of claim were as follows:—

“The plaintiff seeks to recover the following damages, as having been sustained by him; for that the commissioners for improving the port or harbour of Neath, on the 28th of February, 1851, and within the jurisdiction of this court, did, by reason of the want of proper care, skill, and diligence on the part of the said commissioners, \*their  
\*305] agents and servants, cast away the tow-rope of a certain vessel

called the 'Grace Darling,' while in tow of the steam-tug called the 'Dragon-Fly,' and did thereby damage and injure the said vessel called the 'Grace Darling,' belonging to the plaintiff: and the plaintiff was by reason thereof prevented for a long time from trading and carrying on his business as owner of the said vessel; and the plaintiff was also thereby subjected to the expenses of repairing the said vessel, and otherwise damnified; to the plaintiff's damage of 27*l.* 6*s.* 9*d.*, as follows:—

1851.		£	s.	d.
"March.	To amount of bills paid for timber to repair the damage sustained by the vessel . . . . .	4	15	6
	"Paid for spike-nails, ditto . . . . .	0	8	0
	smith's work . . . . .	1	9	3
	ship-carpenters and joiners . . . . .	2	10	0
	superintendence of repairs, &c. . . . .	2	2	0
	"Victualling the seamen during repairs . . . . .	5	12	0
	"Loss of the profit of a voyage . . . . .	10	10	0
		£27 6 9"		

The 189th section of the statute in question enacts "that it shall be lawful for the harbour-master for the time being to give directions for all or any of the following purposes, that is to say, for regulating the time and manner in which any vessel shall enter into, go out of, or lie in the limits of the said port and harbour, and the position, mooring or unmooring, placing, or removing of any vessel within the said limits; for regulating the manner in which any vessel shall take in or discharge its cargo, or any part thereof, or shall take in or deliver ballast within the limits of the said harbour; for regulating the government of any vessel within the said limits."

In support of the claim for damages, the respondent \*adduced evidence to prove that the harbour-master would not allow the "Grace Darling" to be taken in tow by the said steam-tug, without first taking a pilot on board; and, accordingly, the master of the respondent's vessel took one of the pilots of the said harbour on board, who took charge of and steered the vessel; and that, by the negligence and unskilfulness of the master of the steam-tug the "Dragon-Fly," in improperly casting off the tow-rope attached to the "Grace Darling," the said vessel sustained the damage which was the subject of the action, and which was proved to be of the extent and amount stated in the particulars.

In addition to such evidence, and in order to prove the liability of the harbour commissioners for such damage, the respondent further put in evidence certain minutes of proceedings of the said harbour commissioners, of the 29th of April and the 13th of May, 1844, in respect to an arrangement then entered into by them with the proprietors of the said tug-boat, for the employment of the tug-boat in the port and harbour of Neath, and which said arrangement continued in force at



the time the damage complained of was done. The following are copies of the said minutes:—

“Copy of minute made on the 29th of April, 1844.

“Your committee, having given some attention to the effect of the present charges for steam towage on the trade of the port of Neath, and having become aware that instances daily occur where vessels prefer waiting the chances of a fair wind to incurring the expense of steam, and the act (clause 206) authorizing the commissioners to provide steam-tugs for towing or hauling ships,—recommend the commissioners to enter into an arrangement with the proprietors of the Neath steam-tugs, for the employment of their boats at a scale of charges reduced to one-half of the present rates; and that the commissioners do offer \*307] as a compensation to the \*proprietors of such steamers for making such a reduction in their rates, the sum of 225*l.* annually, being the interest at 5 per cent. on 4500*l.*, the estimated value of the boats: the proprietors to engage to provide boats equal to the work at such reduced rate, and the contract to be annual, subject to six months' notice by either party to discontinue the same.

“Your committee rely that the proposed measures will induce such an increase in the trade of this port, that the receipt from shipping-dues will very much approximate to the amount to be paid to the proprietors of the steam-tugs.

“Resolved, that the standing committee be authorized to treat with the Neath Steam Company, on the terms of the report.”

“Copy minute made on the 13th May, 1844.

“Mr. Gwyn and Mr. J. Rees having reported to this meeting, on behalf of the steam-tug proprietors, that they accede to the proposition made to them respecting the employment of the ‘Pioneer’ and ‘Dragon-Fly,’ at the harbour meeting held on the 29th of April last,

“Resolved, that the agreement be confirmed.”

The minute-book of proceedings of the commissioners also set out in several subsequent annual reports, that the arrangement made with the tug-proprietors had worked most beneficially for the interests of the harbour, and that it was desirable that such arrangement should continue. The following is a copy of one of the minutes, made on the 24th of April, 1848:—

“Your committee also deem it essential to the interests of the port, that the compensation be continued to be paid to the owners of the steam-tugs, to enable the tugs to work at their present low rates of towage.”

\*308] The respondent also relied on the 206th section of the \*act of parliament, which enacts “that it shall be lawful for the said commissioners to build or provide vessels, to be propelled by steam or otherwise, or to provide a dredge, for the purpose of cleaning, scouring, and deepening the said port or harbour, or any part thereof; and also

steam-tugs, for towing or hauling ships, barques, or other vessels, or rafts of timber, into or out of the said port or harbour, or for either of such purposes: and any person requiring the assistance of such towing-vessels, steam-tugs, or dredges, shall pay to the said commissioners such reasonable rates or compensation for the use thereof, as shall from time to time be established by the said commissioners."

It was also proved, by the evidence of a proprietor of one of the steam-tugs employed in the harbour service, and who is also one of the harbour commissioners, and was a harbour commissioner when the afore-said resolutions were passed,—that the harbour commissioners had nothing to do with the steam-tugs up to the end of the year 1843; that the steam-tugs had previously been under the management of different captains or masters; that the said resolutions of the harbour commissioners were passed in order that the tugs should be under the control of the commissioners, with the view of controlling the dues of the harbour; and that the control of the steam-tugs was given to Captain Lowther, the harbour-master, because he was the harbour-master.

It was contended, that, by virtue of the said section (206) of the said act of parliament, and on the above evidence, the commissioners were liable for the damage occasioned to the said ship of the respondent, by the negligence, carelessness, and want of skill of the master of the tug-boat.

On the part of the commissioners, evidence was adduced, but failed to prove, that the injury to the respondent's ship arose from the negligence and want of skill on \*the part of the master and pilot of [309 the "Grace Darling."

It was further proved,—in order to show that the commissioners were not liable for the damages done to the said ship,—that the tug-boat "Dragon-Fly" was the property of a private company, and not the property of the commissioners; that the proprietors of the tug-boats appointed their own collector or agent; and that they or their agent appointed or hired the master and crew of the "Dragon Fly;" that such agent, master, and crew were paid their salary and wages by the proprietors of the tug-boats; and that such proprietors alone and exclusively received the proceeds arising from the towage of ships into and out of the port and harbour of Neath, and all the other earnings of the said tug-boats; that the harbour-master was appointed by the proprietors of the steam-tugs, in the year 1843, exclusive manager of the tugs employed in the harbour service, and has continued to be so up to the present time.

On the above evidence, the judge of the county court was of opinion, that the damage done to the respondent's ship was occasioned by the negligence and want of skill of the master of the said tug-boat; and that the said commissioners, by reason of the arrangement disclosed by the said minutes of proceedings and the 206th section of the act of

parliament, were liable to the respondent for such damage; and he ordered judgment to be entered for the respondent for the amount claimed in his particulars against the said commissioners.

The question for the opinion of the court, was, whether, upon the evidence and under the circumstances hereinbefore set forth, the judgment so given for the respondent was right.

*Quain*, for the appellants.—The question is, whether, the relation of  
 \*310] master and servant, or employer and \*employed, existed between the harbour commissioners and the master and crew of the steam-tug “*Dragon-Fly*,” under the circumstances disclosed upon this case. It is submitted that it did not. *Reedie v. The London and North Western Railway Company*, 4 Exch. 244,† is precisely in point. There, a company empowered by act of parliament to make a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors’ workmen for incompetence: the workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him: and it was held, in an action against the company by the administratrix of the deceased, that they were not liable; and that, in such a case, the terms of the contract in question did not make any difference. Rolfe, B., in delivering the judgment of the court, says: “In the case of *Quarman v. Burnett*, 6 M. & W. 499,† this court decided,—adopting the opinion of Lord Tenterden and Mr. Justice Littledale in *Laugher v. Pointer*, 5 B. & C. 547 (E. C. L. R. vol. 11), 8 D. & R. 556,—that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him. The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim ‘*Qui facit per alium facit per se.*’ The party employing has the selection of the party employed; and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed: but neither the principle of the rule, nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has  
 \*311] been \*occasioned. The doctrine of *Quarman v. Burnett* has since been acted on in this court in the case of *Rapson v. Cubitt*, 9 M. & W. 710,† and in the Court of Queen’s Bench in *Milligan v. Wedge*, 12 Ad. & E. 737 (E. C. L. R. 40), 4 P. & D. 714, and again in *Allen v. Hayward*, 7 Q. B. 960 (E. C. L. R. vol. 53). By these authorities we must consider the law to have been settled; and the only question is, whether the law, as settled, is applicable to the facts of

this case."(a) The facts of the present case clearly bring it within the rule thus laid down. [MAULE, J.—What is there to be said in support of the decision?]

*Badeley*, for the respondent.—It has been clearly settled in this court, that the court will not interfere with the decision of the county court judge where the facts and the law are blended together, and that they will only reverse his decision if it necessarily and conclusively appears from the statement submitted to them that he was wrong in point of law,—*East Anglian Railways Company v. Lythgoe*, 10 C. B. 726 (E. C. L. R. vol. 70); *Cawley v. Furnell*, ante, p. 291. [MAULE, J.—Have the views suggested in those cases been adopted or in any way dealt with by either of the other courts?] No. The inclination of this court has been, to decline to deal with a case the whole or all the material parts of which present a mere question of fact, or where the law and the facts are inextricably mixed together, as they are here. [MAULE, J.—Consistently with the cases you cite, the courts have held, that, where, upon the facts stated, it appears that the judge must necessarily have come to an erroneous conclusion in point of law, they will interfere.] The appeal will be dismissed unless it *necessarily* appears from the facts stated, that the judge came to a wrong conclusion in point of law. The harbour commissioners, upon the facts stated, are [\*312 clearly responsible for the injury caused to the plaintiff by the negligence of the master and crew of the "Dragon-Fly," upon the principle laid down in *Bush v. Steinman*, 1 Bos. & Pull. 404, and many other cases. The commissioners are the only persons the shipowner has to deal with: they receive the dues for the services of the tugs, and they have the general control and superintendence of them. They would be responsible if they neglected to provide sufficient boats, and are equally so for employing inefficient crews. The decision of the judge of the county court was therefore quite correct; or, at all events, it is impossible that the court can with any degree of certainty come to the conclusion that he has erred.

MAULE, J.—No doubt, if it could have been made to appear, by any inference of fact that could legitimately be drawn from the evidence submitted to us, that the judgment of the county court might be as it is without any miscarriage in point of law on the part of the judge, that judgment must be left undisturbed, notwithstanding this court might be inclined to draw inferences from the facts which might not consist with the conclusion which he has come to. But we feel no difficulty whatever in saying, that, drawing any inferences that could legitimately be drawn from the evidence here set forth, the judgment for the respondent could not have been arrived at without error in point of law,—that is to say, that the judge of the county court, in deciding

(a) The authorities upon this point are most elaborately discussed in a recent American case of *Blake v. Ferris*, 1 Selden, 48.

that there was any evidence to warrant him in holding the appellant liable in point of law for the injury complained of, must necessarily have been wrong. Without, therefore, at all impugning any of the principles or rules of law adverted to, I think we may with perfect propriety reverse the judgment, and give the appellant the costs of the appeal.

The rest of the court concurring,

Appeal allowed, with costs.

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**\*813] \*THE GREAT WESTERN RAILWAY COMPANY, Appellants; GOODMAN, Respondent. May 11.**

A railway company is responsible for the loss of a passenger's luggage (within the weight allowed), which has been delivered to one of its servants, though not booked and paid for; notwithstanding a by-law which provides that "every first-class passenger will be allowed 112 lbs., and every second-class passenger 56 lbs. of luggage, free of charge; but the company will not be responsible for the care of the same, unless booked and paid for accordingly,"—in the absence of evidence that the company has provided means for the booking of luggage.

THE following case was stated by the judge of the Mary-le-bone county court of Middlesex, upon an appeal to this court:—

This is an action brought in the above-named county court, to recover 35*l.* 14*s.* 3*d.*, the amount of damages alleged to have been sustained by the plaintiff, by reason of the defendants' having on the 9th of October, 1851, received the plaintiff, as was alleged, as a passenger on the defendants' railway, to be conveyed, with her luggage, from Paddington to West Drayton, for hire, and, through the carelessness, negligence, and default of the defendants, as was alleged, part of the plaintiff's luggage which accompanied the plaintiff, was lost by the defendants, and had never been delivered to the plaintiff.

On the trial of the cause, it was proved, that, on the 9th of October last, the plaintiff had travelled from Hitchin in Hertfordshire, by the Great Northern Railway, to London, having then three articles of luggage belonging to her, consisting of one large trunk and two smaller boxes, directed to the plaintiff's address at Uxbridge; that, on her arrival at the London terminus of the Great Northern Railway, she hired a cab, and had the said three articles of luggage placed on the cab; that she, with the said luggage, was driven in the cab, to the station of the defendants' company at Paddington, arriving there a little before 12 o'clock at noon; that she alighted from the cab, and called a porter of the defendants to assist in getting her said luggage down from the cab, which the said porter did; that, the train by which  
 \*814] the plaintiff intended to travel not starting \*until 20 minutes before 2, P. M., the plaintiff desired the defendants' porter to take the said luggage into the second-class waiting-room; that the porter took the said articles of luggage into the waiting-room accord-

ingly, the plaintiff herself going there with the said luggage; that the porter placed the said luggage on the floor, and left the room, and the plaintiff remained in the room to take care of the same until about 20 minutes past 1, P. M.; that the plaintiff then left the waiting-room, and took a second-class ticket, from Paddington to West Drayton, by the said train, which was to start at 20 minutes before 2, P. M., and paid the usual fare for such ticket; that she then called another of the company's porters to her, and told him that she and her luggage were going to West Drayton by the said train which was to start at 20 minutes before 2, P. M., and desired him to label her luggage for West Drayton by that train; that the porter then (it being about  $\frac{1}{2}$  past 1, P. M.) took the said three articles of luggage, and labelled each of them in the presence of the plaintiff, who proved that she saw them labelled, but did not see for what place they were labelled; that West Drayton is one of the company's stations on their said line; that the plaintiff then left the trunk to the care of the porter, and, without giving further directions, or waiting to see the said luggage put into the train, got into one of the carriages of the train which was to start at 20 minutes before 2, P. M., and the plaintiff proceeded in the train to West Drayton; that, on the arrival of the train at West Drayton, the plaintiff asked the guard for her luggage, but only received two of the said articles, the third article, being the large trunk which was the subject of the action, not being found, and it had never been delivered to her, and it was admitted that it had been stolen.

The company duly proved the following by-laws, \*which it [\*315 was agreed should be considered part of the case:—

“The by-laws of the Great Western Railway Co.

“1. No person will be allowed to travel upon the railway without first having paid his fare, and received a ticket.

“2. If any passenger shall refuse to produce or deliver up his ticket when required so to do by the conductor, guard, or other attendant on the train, he shall be chargeable with the fare for the entire journey, and shall forfeit and pay a sum not exceeding the sum of 40s.

“3. Every first-class passenger will be allowed 112 lbs., and every second-class passenger 56 lbs. of luggage free of charge; but *the company will not be responsible for the care of the same, unless booked and paid for accordingly.* All surplus of luggage and merchandise of every description will be charged for. The company's porters will load and unload the luggage at the different stations free of charge.”

(Allowed by Patteson, J., July 14, 1840.)

A witness proved, that, being desirous of insuring and booking his luggage, he endeavoured to do so a few weeks ago, when he took his place, and asked the company's servant of whom he took his place, and from whom he got a ticket in pursuance of which he travelled by one

of the company's trains from Paddington to West Drayton, to be allowed to book and insure his luggage; but the said servant of the company told him to give his luggage to the porters, and they would take care of it. He accordingly gave the luggage to one of the company's porters, who labelled it; and he left it with him, without any further direction; and it was afterwards safely delivered.

No evidence was given, on the part of the company, of any arrangements being made by them for booking the luggage of passengers; nor \*316] was the porter who \*labelled the missing luggage produced as a witness. The plaintiff did not book her luggage, or any part of it, or pay anything to the company in respect of it.

It was contended, on these facts, on behalf of the company, that they were not liable for the lost box, on two grounds,—first, that it had never been delivered in fact into the custody of the company, so as to make them liable for its safe delivery at West Drayton or elsewhere,—secondly, that the company were absolved from the liability by their by-laws. It was admitted that the company were not in any way protected by the carriers' act, 11 G. 4 & 1 W. 4, c. 68.

The judge decided that the defendants were liable, and directed a verdict to be entered for the plaintiff, with damages 35*l.* 14*s.* 3*d.*, which was admitted to be the value of the lost box.

The question for the opinion of the court was, whether the decision of the judge was right. If so, the verdict was to stand. If not, it was agreed between the parties that the verdict should be entered for the defendants, or a nonsuit, as the court should direct.

*Willes*, for the appellants.—There was, no doubt, *some* evidence of delivery of the luggage in question to the company. But, admitting that, and every inference being drawn from the facts stated which could legitimately be drawn, the decision ought to have been the other way.

\*317] The 3d of the by-laws made by the company under the authority of the 144th section(a) of their act of \*incorporation, 5 & 6 W. 4,

(a) The 144th section enacts, "that the said company, at some general or special general meeting of the said company, shall have full power and authority from time to time to make such by-laws, orders, and rules, as to them shall seem expedient for the good government of the affairs of the said company, and for regulating the proceedings, and remunerating and reimbursing the expenses of the said directors, and for the management of the said undertaking and of the officers and servants of the said company, in all respects whatsoever, and from time to time to alter or repeal such by-laws, orders, and rules, or any of them, and to make others, and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same, as to the said company shall seem meet, not exceeding the sum of 5*l.* for any one offence, such fines and forfeitures to be levied and recovered as any penalty may by this act be levied and recovered; which said by-laws, orders, and rules, being reduced into writing under the common seal of the said company, shall be printed and published; and such by-laws, orders, and rules, except such as shall relate solely to the proprietors or directors of the said company, or to any of their officers or servants, shall be painted on boards, and hung up and affixed and continued on the front or other conspicuous part of the several toll-houses to be erected on the said railway and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this act; and which boards shall from time to time be renewed as often as the same, or any part thereof, shall be obliterated or destroyed; and such by-laws, orders, and

c. cvii., in terms exempts them from responsibility for the care of passengers' luggage, unless it is booked and paid for. [MAULE, J.—The facts clearly show a delivery to the company's servants: can the by-law have any effect upon a plaintiff who is not shown to have had any notice of it?] It is by virtue of the by-law only that the company carry luggage: and, if that by-law is a good one within the 144th section, it is clearly binding on the plaintiff.(a) [CRESSWELL, J.—The passenger is allowed to carry a certain amount of luggage without extra payment. I presume the luggage in \*question was within the limit allowed.] It [\*818 may be so taken. The passenger must look after his own luggage. [MAULE, J.—The case states that “no evidence was given, on the part of the company, of any arrangements being made by them for booking the luggage of passengers.”] That statement ought not to have appeared in the case: it is a mere statement of an extra-judicial opinion, or dictum, of the judge against whose decision the appeal is. If there was no office for payment for passengers' luggage, the plaintiff should have proved that as a fact. [MAULE, J.—The proper effect of the by-law in question would seem to be, to give the directors power to make contracts restrictive of the company's liability: they do not, however, seem to have acted upon it.] The by-laws are expressly made binding upon all persons, and sufficient in all courts of law or equity.

*T. Jones*, contra, was not called upon by the court.

MAULE, J.—It was a question of fact in this case whether the contract upon which the plaint was founded was proved, and whether the evidence showed that it was broken. There was a clear *prima facie* case of liability made on the part of the plaintiff: and it is enough to say that there is nothing in the evidence which made it compulsory on the judge to find that that *prima facie* case was at all varied or qualified. If there was evidence which would have warranted a jury to find for the plaintiff, the judge was not bound to tell them that there was no evidence to support the plaintiff's case. I think the respondent is entitled to the judgment of this court.

The rest of the court concurring,

Appeal dismissed, with costs.

*rules shall be binding upon and be observed by all parties, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same; provided that such by-laws, orders, or rules be not repugnant to the laws of that part of the united kingdom of Great Britain and Ireland called England, or to any directions in this act contained; and all such by-laws, orders, and rules shall be subject to appeal in manner hereinafter (s. 215) mentioned.”*

(a) See *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212.†



CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,

Trinity Term,

IN THE  
FIFTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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The Judges who usually sat in Banco in this Term, were :

JERVIS, C. J.  
MAULE, J.

CRESSWELL, J.  
TALFOURD, J.

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DOE d. ROBERTON v. GARDINER. June 12.

A. being seised in fee of a moiety of certain lands, and B. being seised for life of the other moiety, they, in 1805, by indenture, reciting that they were entitled thereto as tenants in common, and that they had agreed to grant a *perpetual lease* thereof to C., his heirs, &c.,—granted, demised, &c., the same to C., “his heirs, executors, administrators, and assigns, for ever,” to hold from a day then past unto and to the use of C., “his heirs, executors, administrators, and assigns, for ever;” yielding and paying therefor yearly and every year to A. and B., their heirs, &c., the clear yearly rent or sum of 120*l.*, half-yearly, &c. The deed contained all the covenants usually found in an ordinary lease :—

Held, that, in the absence of proof, that, at the date of the deed, the premises were in the occupation of tenants, so that a reversion only could pass, and the expressed intention of the parties precluding the court from presuming that there had been livery of seisin,—the deed could not operate as a conveyance of the fee, subject to a *rent-charge*, but created only a tenancy from year to year.

THIS was an action of ejectment for the recovery of an undivided moiety of certain lands and premises situate in the parish of Manchester, in the county of Lancaster.

On the trial before Cresswell, J., at the last Spring assizes at Liverpool, a verdict was found for the lessor of the plaintiff, with nominal damages, subject to the opinion of this court upon the following case :—

\*820] \*The lands of which the undivided moiety was sought to be recovered, formerly belonged to a Mrs. Catherine Heath, widow,

who by her will, dated the 21st of May, 1772, devised them to her daughter Mary Heath, and her other daughter Hannah Robertson, wife of William Robertson, Esq., and their heirs, for ever, as tenants in common.

Mrs. Catherine Heath died in the year 1780.

On the 23d of August, 1781, an indenture was executed between the said William Robertson and Hannah his wife of the one part, and one Daniel Whittaker of the other part, whereby the said William Robertson and Hannah his wife covenanted that they would, at the then next or some other subsequent assize to be holden for the county palatine of Lancaster, acknowledge and levy, &c., one or more fine or fines sur conu-  
sance de droit come ceo, &c., with proclamations, unto the said Daniel Whittaker and his heirs, of the undivided moiety or equal half part of, amongst others, the lands devised by Mrs. Heath above-mentioned: and it was thereby declared that such fine or fines should enure to and for the use and behoof of such person and persons, and for such estate and estates, intents, and purposes as the said William Robertson and Hannah his wife, or as the said Hannah alone, without the said William Robertson, her husband, notwithstanding her coverture, should, in such manner as was therein contained, limit or appoint: and, in default of such limitation or appointment, to the use and behoof of the said William Robertson and Hannah his wife, for their joint lives and the life of the survivor of them; and, from and after the decease of the survivor of them, to the use and behoof of the right heirs of the said Hannah Robertson for ever.

A fine was shortly afterwards, in the same year, levied accordingly. In February, 1801, Hannah Robertson died without having executed any of the powers of the \*above-mentioned deed, leaving her husband surviving. On the 2d of April, 1802, her son and heir, Archibald Hamilton Robertson, died. He left two daughters surviving,—Mary, the lessor of the plaintiff, born on the 20th of September, 1798, and Emily, born on the 25th of April, 1801. [\*321]

On the 1st of May, 1801, by indenture between Mary Heath, above mentioned, and the said William Robertson, of the one part, and James Rothwell of the other part, the said Mary Heath and William Robertson demised to the said James Rothwell a warehouse, with the appurtenances, part of the said premises so devised by Catherine Heath, and then in the possession of the said James Rothwell, for the term of eleven years from the 24th of June then next.

On the 8th of February, 1805, by indenture between Mary Heath, above mentioned, and the said William Robertson, of the one part, and James Heath of the other part,—reciting that the said Mary Heath and William Robertson, by virtue of the last will and testament of Catherine Heath, widow, deceased, late mother of the said Mary Heath, and of Hannah Robertson, late wife of the said William Robertson, were

entitled, as tenants in common, amongst other things, to the hereditaments and premises hereinafter mentioned, and that the said Mary Heath and William Roberton *had agreed to grant a perpetual lease thereof to the said James Heath, his heirs, executors, administrators, and assigns*, in manner hereinafter mentioned,—it was witnessed, that, *in pursuance of the said agreement*, and for and in consideration of the clear yearly rent, covenants, and agreements hereinafter mentioned and reserved, and on the part and behalf of the said James Heath, his heirs, executors, administrators, and assigns, to be paid and performed, they the said Mary Heath and William Roberton, according to their \*322] several and respective estates, rights, and \*interests in the hereditaments and premises hereinafter mentioned, granted, *demised, leased, set, and to farm let unto the said James Heath, his heirs, executors, administrators, and assigns, for ever*, the said lands devised by the said Catherine Heath, described to be in the respective tenures or occupation of William Nabb, James Rothwell, Hardwick Taylor, Hughes Giles Chatterton, Robert Jackson, and others, to hold from the 25th of December then last past, *unto and to the use of the said James Heath, his heirs, executors, administrators, and assigns for ever,—yielding and paying therefor yearly and every year unto the said Mary Heath and William Roberton, their heirs, executors, administrators, and assigns, for ever*, as tenants in common as aforesaid, *the clear yearly rent or sum of 120l. half-yearly, on every 24th of June and 25th of December, with a proviso for re-entry on non-payment of the said rent for twenty-one days, and no sufficient distress being on the premises.* The indenture contained a covenant by the said James Heath with the said Mary Heath and William Roberton, their heirs, &c., for payment of the said rent, also of all chief or quit-rents; also a covenant to pay all taxes except property-tax; also a covenant to maintain and keep the premises in good and sufficient tenantable repair at all times during the continuance and validity of the lease; also a covenant to keep the premises insured from fire, not to assign, &c., &c.

A memorandum was endorsed on this deed, signed by the said Mary Heath and William Roberton, consenting and agreeing that the said James Heath, his heirs, executors, administrators, or assigns, might, at their will and pleasure, assign the said lease and premises to any person or persons whomsoever.

On the 25th of February, 1812, the said William Roberton died.

\*328] In December, 1813, the said Mary Heath died, \*devising her property to the lessor of the plaintiff, Mary, and her sister Emily. Emily died unmarried, in 1836.

In 1825, James Heath, the lessee, died, and was succeeded by his son and heir-at-law, Ashton Marler Heath, who afterwards, on the 9th of May, 1840, deposited the said deed of the 8th of February, 1805, and his other deeds and writings relating to the said premises, with the

defendants, by way of equitable mortgage, for moneys advanced by them to him exceeding the value of the said premises, without any notice to them, at the time of such advances and deposit, of the title of the lessor of the plaintiff.

The said Ashton Marler Heath afterwards becoming bankrupt, he, together with his assignees, on the 2d of December, 1848, conveyed the lands to the defendants, in fee, for value, in part satisfaction of the said advances then remaining unpaid. They had notice of the title of the lessor of the plaintiff before they took such conveyance.

The lessor of the plaintiff afterwards gave notice to quit, as to the moiety in question.

The mother of the lessor of the plaintiff,—who had been examined on interrogatories,—stated in her examination, that her daughters, Mary (the lessor) and Emily, received 120*l.* a year from the property, the undivided half part of which was sought to be recovered, from the time of their respectively coming of age up to the death of the said Emily, and that, since her death, the same sum had been received by or on behalf of the said Mary up to Christmas, 1850; that she, the mother, first received the rent herself of one undivided moiety of the property, amounting to 60*l.*, in the year 1812, on behalf of her said two daughters, who were then minors, and continued to receive it during their minorities; that the first half-year's rent became due at Midsummer, 1812, and that she, the mother, received it in right of her [\*324 daughters, as co-heiresses of their father, the said Archibald Hamilton Robertson, and, on the death of the said Mary Heath, which happened in December, 1813, she, the mother, received the rent of the other moiety of the property, amounting to 60*l.*, for her said daughters, as devisees of the said Mary Heath, during their minorities,—the first payment of such rent of that moiety being due at Christmas, 1813; that the rents of both moieties were paid by James Heath up to the time of his death, and since his death, which happened in the year 1825, they were paid by his son, Ashton Marler Heath, up to Christmas, 1847; that the rents accrued since that time had been paid by the defendant up to Christmas, 1850; that the rents became due half-yearly, at Christmas and Midsummer; and that the amount, for both moieties, had been 120*l.* a year.

[The case then set out a long correspondence between the lessor of the plaintiff and Ashton Marler Heath, and receipts signed by the lessor for the rent of the premises comprised in the deed of the 8th of February, 1805. The view, however, which the court took renders it unnecessary to refer to them.]

The counsel for the defendant contended that the lessor of the plaintiff was barred by the statute of limitations.

It was agreed that the court should draw any inferences which a jury ought to draw.

The question for the opinion of the court was,—whether the lessor of the plaintiff was barred by the statute of limitations. If not, the verdict was to stand: but if the court should be of opinion that she was so barred, a nonsuit was to be entered.

*Cowling* (with whom was *Knowles*), for the lessor of the plaintiff.—The lessor of the plaintiff is not barred by the statute of limitations, \*325] and consequently she is \*entitled to recover in this ejectment. In discussing this question, it will not be necessary to take up the title earlier than the 8th of February, 1805. It appears that the land a portion of which is now in question formerly belonged to Catherine Heath, who devised it to her two daughters, Mary Heath and Hannah Robertson. Hannah Robertson and her husband, in August, 1781, covenanted to levy a fine of the moiety now sought to be recovered, to the use of themselves for their joint lives and the life of the survivor, remainder to the right heirs of Hannah for ever. The fine was levied shortly afterwards. Thus, Mary Heath became seised of one moiety of the property in fee; and, as to the other moiety, Robertson and wife became tenants for life, with remainder to Hannah Robertson in fee. Hannah died in 1801; and her son and heir died in 1802, leaving two daughters,—Mary (the lessor of the plaintiff) and Emily (now deceased). At the time, therefore, of the execution of the deed of the 8th of February, 1805, Mary Heath was seised in fee of one moiety, and William Robertson was seised for life of the other moiety, the reversion in that moiety being in the lessor of the plaintiff and her sister Emily. On the 8th of February, 1805, Mary Heath and William Robertson made what is termed a perpetual lease of the moiety in question to James Heath. William Robertson died in 1812: and Mary Heath died in 1813, having devised her moiety to the lessor of the plaintiff and Emily. Upon the death of William Robertson, therefore, the lessor of the plaintiff and her sister Emily became entitled to, and, as the case finds, actually received, a moiety of the rent reserved by the lease of the 8th of February, 1805; and, upon the death of Mary Heath, they became entitled to, and received, the whole rent of 120*l.* per annum. The question presented for the opinion of the court depends upon the construction of three sections of the statute 3 & 4 W. 4, \*326] \*c. 27. It is submitted that the lessor of the plaintiff is not barred, for two reasons,—first, because there has been a sufficient perception of the rents and profits to prevent the operation of the statute,—secondly, because there has been such an acknowledgment of title by the tenant as to take the case out of the statute. The 2d section of the statute enacts, “that, after the 31st of December, 1833, no person shall make an entry or distress, or bring an action, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within

twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." The 3d section explains the meaning of "right of action first accruing." It enacts, "that, in the construction of this act, the right to make an entry or distress, or to bring an action, to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say,—when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;—and, when the person claiming such land or rent, shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest \*until [327 the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;—and, when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;—and, when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;—and, when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken." The 35th section explains what are "profits of the land:" it enacts "that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land, for the

\*328] purposes of this act." The rent reserved by the \*lease of the 8th of February, 1805, having been duly paid from that time to the present, there has been a tenancy from year to year created by that lease (though a void lease, as to the moiety of the lands now in question, upon the death of the tenant for life), and a receipt of the rent within the meaning of the 35th section. The reservation, though of a *joint rent*, is in truth a reservation of several rents in respect of each moiety: Litt. § 314; Co. Litt. 197 a,—“Albeit the reservation of rents severable be in joint-words, yet, in respect of the several reversions, the law maketh thereof a severance.” Bac. Abr. *Joint-Tenants* (K). The case, indeed, shows that this has been treated as a reservation of several rents. It is hardly necessary to cite cases for the purpose of showing, that, where there has been a holding under a void lease, and a payment of rent, a tenancy from year to year is created. The cases upon the subject are collected in *Doe d. Brammall v. Collinge*, 7 C. B. 939 (E. C. L. R. vol. 62). The receipt by the reversioners of the exact rent reserved by the lease, clearly could not operate as a confirmation of it. This was distinctly decided in *Doe d. Martin v. Watts*, 7 T. R. 88.(a)

*Tomlinson* (with whom was *J. Thompson*), contra.—The claim of the lessor of the plaintiff is barred by the statute of limitations. At the time of the making of the deed of the 8th of February, 1805, William Roberton was tenant for life of the one moiety of the land, and there was a vested remainder in fee-simple in the two granddaughters: therefore, the deed is a conveyance made by a tenant in fee-simple of one undivided moiety, and by a tenant for life of the other. It is submitted that it operates an absolute conveyance of the fee-simple, creating a \*329] distinct rent-charge in perpetuity. At this \*distance of time, the court will presume that livery of seisin was given, or that the parties had only a reversion. In *Rees d. Chamberlain v. Lloyd, Wightwick*, 123, it was held that livery of seisin may be presumed after twenty years' possession. And that doctrine was recognised and acted upon in *Doe d. Wilkins v. The Marquis of Cleveland*, 9 B. & C. 864 (E. C. L. R. vol. 17), 4 M. & R. 666, and *Doe d. Lewis v. Davies*, 2 M. & W. 503.† If that be the legal effect of the deed, there is no reversion left. The rent is divided from the land, and the two are made distinct estates. The court, being at liberty to draw inferences of fact, as a jury might, may assume that the premises were in the occupation of tenants; more especially as the deed so recites; and in that case it could only operate as a grant of the reversion: so that, quæcunque viâ, the fee passed. It may be said that the covenant not to assign is inconsistent with this view: but such a condition in a grant of the fee is void. Littleton says, § 360,—“If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because, when a man is infeoffed of lands or tenements, he hath

(a) The argument on the second point is omitted, for the reason before stated.

power to alien them to any person by the law: for, if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Lord Coke, in commenting upon this section, says,—Co. Litt. 223 a,—“ And the like law is of a devise in fee upon condition that the devisee shall not alien; the condition is void: and so it is of a grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For, it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him, should restrain his feoffee in fee-simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his \*whole interest or property therein upon condition that the donee or vendee shall [\*330 not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic and bargaining and contracting between man and man: and it is within the reason of our author that it should ouster him of all power given to him.” [MAULE, J.—It may be that a thing may operate as a covenant where it cannot operate as a condition. The argument on the other side, is, that the existence of such a covenant is inconsistent with the presumption that a fee was intended to pass. The object no doubt was, to protect the party's interest in the rent-charge.] The deed, it is submitted, operated as a feoffment. Littleton, § 214, says,—“ If a man will give lands or tenements to another in the taile, yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that such gift was made without deed, because that such rent is rent-service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years, rendering rent.” Again, § 215,—“ But, in such case, where a man upon such a gift or lease will reserve to him a rent-service, it behoveth that the reversion of the lands and tenements be in the donor or lessor: for, if a man will make a feoffment in fee, or will give lands in tail, the remainder over in fee-simple, without deed, reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor, and such tenant holds his land immediately of the lord of whom his donor held, &c.” “ But, if a man (§ 217), by deed indented, at this day, maketh such a gift in fee-taile, the remainder over in fee; or a lease for life, the remainder over in fee; or a *feoffment in fee*; and by the same indenture he reserveth to him and to his heirs a certain rent, and that, if the rent be behind, it \*shall be [\*331 lawful for him and his heirs to distrain, &c., such a rent is a *rent-charge*; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his



heirs, a certain rent, without any such clause put in the deed, that he may distrain, then such rent is rent-seck; for that he cannot come to have the rent, if it be denied, by way of distress; and if in this case he were never seised of the rent, he is without remedy." There is no foundation for supposing a tenancy from year to year created in this case. A marked distinction is made throughout the statute 3 & 4 W. 4, c. 27, between "profits of the land" and "rent." The term "rent" is used in different senses in various parts of the act: but, in the first five sections, it is used as contradistinguished from "profits of the land:" see the judgment of Lord Denman, in *Doe d. Angell v. Angell*, 9 Q. B. 355, 356 (E. C. L. R. vol. 58). The lessor of the plaintiff here has a perfectly good title to a rent-charge; but she clearly is not entitled to the rents and profits of the land, within the meaning of the statute, as there explained. Where there is a tenancy from year to year, rent is paid as an acknowledgment of the title to the land. Here, it has not been so paid: all parties assumed it to be a payment under the deed.

*Cowling*, in reply.—The argument resolves itself into two points,—first, what is the proper construction of the deed of the 8th of February, 1805,—secondly, what has been the subsequent conduct of the parties. Taking the second point first,—there has been a taking of the profits by the lessor of the plaintiff and her sister since the death of William Robertson. Whatever the legal construction of the deed, the parties have acted as if it was a legal demise of the land: the rent was received as \*382] rent in the ordinary way. The deed purports to be an ordinary \*lease, and it is in every respect an ordinary lease, save that it purports to grant the land for ever. It does not profess to grant a rent-charge: the words of the reddendum are words of reservation, not of grant; and the covenant is, to pay the rent reserved for the enjoyment of the land. See the form of a release in fee, in consideration of a perpetual rent-charge, 9 Jarman's Precedents in Conveyancing, p. 518. [MAULE, J.—Blackstone says,—2 Bl. Comm. 42,—“A rent-charge is, where the owner of the rent hath no further interest or reversion expectant in the land; as, where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that, if the rent be arriere or behind, it shall be lawful to distrain for the same. In this case, the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for payment of it.” He seems to contemplate just such an instrument as this.] This is an ordinary reservation of rent: where it is intended to create a “rent-charge,” the words used in the deed always are, “annual sum or rent-charge.” [JERVIS, C. J.—Suppose the court will presume livery of seisin here, or that the premises were full at the time of the grant, so that a reversion only could be granted, what would be the effect of the deed?]

William Roberton having a life estate only, the rent-charge, as to a moiety, died with him: and the subsequent payments made under an impression that the rent-charge was still existing, could only have the effect of creating a tenancy from year to year. A rent-charge can only be created by express grant, not by estoppel. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court.

\*It will not be necessary to decide some of the questions which were raised upon the argument of this case, because we are of [\*333 opinion, that, under the circumstances, we ought not to make the presumptions which are necessary to raise those questions.

In the course of the argument, Mr. Cowling described the instrument of the 8th of February, 1805, as a perpetual lease; whereas, Mr. Tomlinson contended that it operated as a conveyance in fee of the land, with the creation of a rent-charge.

If it had been proved that the premises were in the occupation of tenants when the instrument was executed, or if we were to presume livery of seisin, it would operate as a conveyance in fee: but, as there is no evidence that the premises were in the occupation of tenants (the description of the premises not being evidence against the lessor of the plaintiff, who was not party or privy to the instrument), if we do not presume livery of seisin, then, as the instrument cannot operate as a perpetual lease, the premises must have been held upon a tenancy from year to year, upon the terms contained in that instrument. An examination of the instrument shows that the parties intended it to operate as a perpetual lease; but, as it cannot legally have that operation, we must either presume that the premises have been held upon a yearly tenancy, upon the terms contained in the instrument, or we must presume livery of seisin,—an act inconsistent with the expressed intention of the parties,—so as to convert the instrument into a conveyance in fee.

Were it necessary to presume livery of seisin, in order to account for the possession under the instrument, the authorities show that we ought to make that presumption. But it is not necessary to do so. The case shows that the rent has been paid regularly to the lessors and their successors; and it is more consistent with the acts \*of the parties to presume that the relation of landlord and tenant subsisted between [\*334 them, than to presume livery of seisin, which was inconsistent with their intention when the instrument was executed.

In this view of the case, the lessor of the plaintiff has been continuously in the receipt of the rents and profits of the estate, and the statute of limitations is no bar.

Our judgment must be for the lessor of the plaintiff.

Judgment for the lessor of the plaintiff.

Ex parte LYDIA SPARROW. *May 8.*

An affidavit to found a motion under the 3 & 4 W. 4, c. 74, s. 91, must describe the deponent as "wife of," &c., even though it discloses circumstances showing a well-grounded belief that the husband is dead.

G. HAYES moved for an order under the 3 & 4 W. 4, c. 74, s. 91, to enable Mrs. Lydia Sparrow to convey certain property at Toleshill, in the county of Warwick, to which she was entitled in her own right, without her husband's concurrence. The affidavit stated the circumstances under which the deponent's husband had deserted her shortly after their marriage in 1804, and further stated that she was ignorant whether he was living or dead; but it contained no description of the deponent,—whether as wife or widow.(a)

JERVIS, C. J.—We cannot grant an order upon an affidavit which contains no description of the deponent. The rule may however go, upon the production of an amended affidavit.

An affidavit was afterwards produced describing the deponent as "the wife of Richard Sparrow, formerly of the parish of St. John the Baptist in the city of Coventry, baker."

(a) "Widow" would be an inaccurate description, inasmuch as the act only applies to "married women:" see *Ex parte Mary Noy*, 7 Scott, N. R. 434.

\*335] \*SHOUBRIDGE v. CLARK. *June 9.*

A vicar choral of St. Paul's Cathedral is not entitled, *during his year of probation*, to share in a fine paid on the renewal of a lease by the dean and chapter and vicars choral, of an estate which is one of the sources of the emoluments enjoyed by such vicars choral.

Had he been entitled, money had and received would, it seems, have been the proper form of action to recover it,—either against all the other vicars choral, or against the pittance, the person intrusted with the collection and distribution of the funds.

ASSUMPSIT. The declaration consisted of a count for money had and received and a count upon an account stated. The defendant pleaded non assumpsit.

The particular of demand was as follows:—"This action is brought to recover the sum of 183*l.* 6*s.* 8*d.* had and received by the defendant to the use of the plaintiff, from the lessee of a certain estate situate at Steeple Bumpstead, in Essex, and paid over to the said defendant by Christopher Hodgson, Esq., or other officer of the dean and chapter of the cathedral church of St. Paul, London, being the sixth part of a sum of 1100*l.* paid by the said lessee on the renewal of a term of years heretofore granted of the said estate to the said lessee by the said dean and chapter and vicars choral of the said cathedral church."

The cause was tried before Wilde, C. J., at the sittings in Middlesex after Hilary Term, 1850, when a verdict was found for the plaintiff for

the amount claimed, subject to the opinion of the court upon the following case :—

The plaintiff and defendant were, at the time of the commencement of this action, vicars choral of St. Paul's cathedral, London.

The several books hereinafter mentioned, which are preserved amongst the archives of St. Paul's Cathedral, and intituled respectively "*Statuta minora Ecclesiæ Sancti Pauli*," "*The Register of the Dean and Chapter, Liber A.*," "*The Muniment Books*," and "*The Registers of Leases*," were produced at the trial. The said book called "*Statuta minora*" contains ordinances \*concerning the vicars choral of the said cathedral; and the following are extracts therefrom :— [336]

"In Dei nomine, Amen. Incipit registrū consuetudinū Ecclē Sci. Pauli, London. que sunt extracte ex pluribꝫ antiquis libris et munimentis in archivis ipsius Ecclē existentibꝫ, ipsas consuetudines sparsim p<sup>r</sup>. certu ordine olim confuse continentibꝫ in presens opusculū p. recolende memorie Radulphū.

"In caplo ipsius Ecclē cū quibusdā regulaciōibꝫ postea subsequentibꝫ.

"De Vicariis.

"Quod tricenarius de ydoneis psonis vicarioꝝ numerus qm̄cicius fieri po'tit augeatur. Nullus admittat' in vicariū nisi ydonea psona de moribus et conversacōe, et qd. sit liber et legitim. testiom. et pbat. caritatis, et bonā vocem habens. Nullus eoꝝ de nocte ad matut. cū capl̄eo laico sub capis vel de die cū pileo nisi duplicato sub caput ad horas canonicas ingrediant' In yeme tñ urgente frigore de nocte liceat illis gestare. almu-  
cia simplicia de panno nigro ult<sup>a</sup> colli mediū ptensa. Item ut illi qui adtunc in minoribꝫ sunt ordinibꝫ cōstituti et ūlt<sup>a</sup> annū morā fecerint se pcrent in pxima celebratione ordinū ad sacros ordines pmoverti alias diucius non tollerent'; in Ecclā assignati ad ministrū misse beate Virginis, ante altare ipsius horas ejus dicant singulis diebꝫ anteqm̄ inchoet' missa de eadem et ministrū ibide devote peragant et honeste. Alias stipendioꝝ suoꝝ porcō substrahatur, videlicet p singulis defectibꝫ; singuli denar. camerario psolvantur. Item statim post terciam tintinacōem missa bē Vḡis inchoet'. om̄ibꝫ presentibꝫ ante Kyriel qui ad eam sunt intitulati alias, &c. Itē qd custodes luminaris ejusdem mutantur altf̄is annis et raciocinia reddant de receptis et exp̄s. Itē qd vicarii pcuratoꝝ aut attornatoꝝ offō in foro ecclesiastico vel civili decetō non fungantur. Itē qd sup. \*capas nigras sordidas vel compictas non induant sericis capas [337]  
chori sꝫ suppelliciū h'eant vel rochetu. Itē celebrantibꝫ ad majus altare om̄es clerici chori respondeant quociens opus fuerit sine mora. Itē qd vicarii de novo recepti et impost'um recipiendi singulis diebꝫ infra annū pbacōis sue unū noctine Psaltw̄rii ita dicant attente et ympnariū ac co'em sc'oꝝ historia invitatoria et venitariū adeo diligenter int'ea repetant qd ea cordetenus scientes mereantur anno pbacionis revoluto in ven'abili Ecclē minist'ro retineri. Alioquin tamqm̄ inhabiles expellantur in fine anni. Nullus cū Balista vl Archu circa Eccliam ad

colūbas vel aves alias t'here psumant. Itē alibi ꝑt contenta in injunctioibꝫ ꝑdicis cōptū est de vicariis, videlicet Anno Domini MCCLX et declaratū est vicariū defuncti ab ejus stallo nō esse amovendū sine causa. Eciā si novus canonicus velit alium, eciā post annū defuncti ꝑsentare. Item Anno Dñi MCCLXXIII ordinatū est et cōcessū qđ vicarii in aula sua ꝑ'it' comedant in cōi nisi alibi fuerint invitati. Item Anno Dñi MCCCXIII declaratū est qđ inopinata absencia vicarii c'ta hora non abest novo residēciario sꝫ: vicarius puniat'. Itē de pena (de pena) canonicorꝫ minorꝫ et vicarioꝫ qui non b'n sequēt' chorū cōtinetur eodē nigro libro in ꝑncipio in caplo cū vicarii canonicorꝫ etc. per G. Decanū et frēs tūc ꝑsentes cōcessus fuit integre denus denar. adjuncta pena cont' male minist'ites sicut inferius continet' fuit igitur sic imp'mis ordinatū contra minores ꝑbendar. qui fuerant diucius circa offiū chori nimis negligentes ut qui in chori frequentacōe inventi fuerint n'gligentes si se decetō ex consuetudine subtraxerint a matutinis ꝑ subtraxonem uniq. bolle de libracōe sua cōstituta puniatur. Sic puniendi si in hora ꝑma missa majori et vesp'is absentes fuerint a choro, vel si scꝑti in tabula nō expleverint qđ tabula sibi dictav'it agendū ꝑ se vel ꝑ socios et sine defectu, et hoc circa sanos et bñ valentes volumus observari. Minutis \*338] ex licencia sup'ioris et infirmis seu ex licencia et sup'ioꝫ ꝑcepto absentibꝫ exceptis. Ita tñ q' absencie ipoꝫ vel impotencie seu injuncōes illis nucientur qui tabulam sēbunt nec ꝑpt. ꝑmissa credant aliquatenus se a frequentacōe aliquaꝫ horarꝫ canonicarꝫ absolutos: licet illis comodius possent et alt'natim interesse et vicissim ut absentes domesticis suis negociis intendāt computatis in talia sua ꝑ custodem Bracini subtraccōibꝫ hujusmodi cujus libet eoꝫ qui sic fuerit puniendus sup' absenciis vº talu et delictis. Credi volumus testi'o quoz vñ trium qui ab utraq ꝑte chori Eccliam bene frequentant, et jurati alioꝫ absencias fidelit' descrbant et defectus inqua libet rei feri Decano et Caplo ꝑsentent. Circa vicarios autem sic duximus ordinand. ut ꝑter pitancias defunctoꝫ et alia beneficia ipis bñ meritis assignata integm decet'o dem denar ꝑcipiant in ebdomoda ne de brevitate stipendioꝫ conquerant' quibꝫ singulis si modo sup'dco fuerint absentes ab horis principalibꝫ ꝫ qualibꝫ absencia ipoꝫ unu denar. amittant: eode aute si reliqu offi' Ecclie insolent' frequentar coteperit ꝫ ampliore subtracoem si denus non sufficiat cu fiat dist'buco ꝑventuum Ecclie de Bumsted decernimus puniendos, fidem habituri sup. negligenciis ipoꝫ hiis quos ad hec scrutanda deputamus. Statuimus ut cu faciede ꝫ defunctis occurrerint in missis matutinalibꝫ pitancie int. cl'icos chori officio defunctoꝫ ꝑsentes ut vitet' eos discursus non fiat ꝫns dist'buco qm offiū misse plene consumet'. Idem autē vicarii eidem legi circa obs'vacōm absenciaꝫ minocionū et similiu subjaceant que circa minores canonicos est edita suis stipendiis, et aliis sibi constitutis pitanciis ac ꝫventibꝫ dū s'vierint contenti."

"Explicit ordo registri consuetudinū antiquaꝫ. Incipiunt declar-

ciones sup dubiis emergentibu que in p'cedentibus non sunt expressa, p' ut sequitur:—

\*“Hi sunt declaracões sup quibzdam dubiis et emergentibz in Ecclia Sci. Pauli, London., post p'oꝝ consuetudinum [\*339 in una copilacōem extracte de registro Capli Sci. Pauli, London., tam novis qm̃ antiquis, que in p'cedenti cōpilacōe nō copiant' plene et determinate.

“Item. Volumus qd. duo sacerdotes bone et honeste conversacionis et maturi in vicarioꝝ domibz cōmorent' qui eoꝝ introitu videant, et egressu ac Decano vel ejus locutenenti insolencias nuncias eorundē.

“De Vicariis.

“Injungim' eciam om̃ibz vicariis qd unusquisq eoꝝ coronam irrep'hen-sibilis pietatis habeat, tonsuram scdm̃ gradū sui ordinis congruente crinibz itaq̃ incicis qd. inferiores extremitates aurium detegant'. Eisdem eciam spūalit' injungim' qd. unusquisq eoꝝ in sua septimana cantariam suam p se ipm̃ teneat nisi p infirmitate seu injuncōem fuerit impeditus. Et qd. deceto in choro cantent cantus organicos ubi epla de more legit' et ño in pulpito sicut fieri consuevit. Injungim' eciam singulis vicariis quod quociens misse Beate Virginis diebz vicis sue int'sunt te'pestive veniant, et usq3 ad cōsumacionem misse remaneant a tumultu rixa et aliis inhonestis desistent omnino: et p'cipimus qd. vicarius nimis tarde veniens scilicet antiqm̃ p'mum evangelium incipiat' vel ante finem misse recedens denariū unū amittatq3 pari pena unūquumque eoꝝ dec'nentes multari p qualibet absencia a matutinis. Ite injungim' om̃ibz supradicis qd. tā de die qm̃ de nocte in Hospiciis suis conversent' honeste cōm̃ mensam in illis int'nsedo nisi cū a majoribz canonicis vel aliis p'sponibz honesti alibi fuerint invitati: jacendo ecia et morando exceptis horis debitis quibz vel p' officiendo Eccliam vel p spaciando exierint in comitiva decenti. Int'dicentes eisdem nichilom' consuetudine inhonesta et colloquiū cū mulieribz suspectis maxime in Ecclia ex quo \*scandalū pot'it suboriri. Et qd nec de [\*340 die nec de nocte p civitatē discurrunt; nec extra hospiciū p'pe hospitent', nec tabernas ingrediant' occasione quacūq3 cū a tālibz Dei ministri debeant penitus esse alieni. Itē quia diebz festivis et solemnibz p'cipue magis indecens est choru dū hore dicunt' vicariis vacuū inveniri, omnibz vicariis firmit' injungim' qd deinceps dominos suos ad ostiū capli non exp'tent sicut est antea usitatū, s3. stati incepta hora tōia unanimiter rev'tantur in chorū et morā trahant ibidem quousq' hore cōpleant' nisi forte de mandato nro seu dño suo optent aliquē eoꝝ exire. Precipientes similit' qd. in p'mis vesperis fest3 et dupplici et secundis cū canonicus major vel minor offm̃ cōpleturus p incensandis altaribz chorū exierit. Nullus vicarius pt' sedariū et ppliū ejusd canonici extra chor sequat', nisi a decano licenciatus ex c'a vel tenente loc ejus.”

The following are extracts from the said book called "The Register of the Dean and Chapter, Liber A.:"—

"Omnibus sanctæ matris ecclesiæ filius præsens scriptum inspecturis Richardus, Prior de Stoke, et ejusdem loci conventus, salutem in Domino sempiternam. Noverit universitas vestra nos divinæ pietatis intuitu concessisse, et hac præsentī carta nostra confirmasse Deo et Ecclesiæ S. Pauli, London. ad sustentationem clericorum secundum ordinationem venerabilis Patris Eustathie London. Episcopi, in eadem ministratur quicquid juris habemus vel habere potuimus in Ecclesia de Bomstad (exceptis decimis illis, quas a longo tempore possidemus in eadem parochia), et excepta pensione unius marcæ quam in eadem Ecclesia habemus, et excepta vicaria competenti per eundem episcopum taxand. in qua vicaria hoc solum nobis retinuimus: ut cum ipsam vicariam vicare contigerit, Episcopa London. qui pro tempore fuerit, \*341] liceat nobis et successoribus nostris personam idoneam ad eundem presentari. In cujus rei testimonium, &c."

In pursuance of this grant, the said Bishop Eustace, having gotten likewise five marks yearly issuing out of the church at Finchignfield, in the said county of Essex, for the same purpose, ordained as follows:—

"Singulis septimanis sex clerici cum uno sacerdote de choro vicissim elegantur, qui celebratione missæ de Beata Virgine singulis diebus interserint, et matutinas et alias horas canonicas coram altari ejusdem decantaverint. Quibus fructus Ecclesiæ præfatæ de Bumstad una cum quinq. marcis prædictus prout meruerunt distribuantur, salva competenti vicaria memorata. Hiis testibus, Galfrido, Archid. London."

The said muniment books contain acts of the said dean and chapter in regard to officers of the Cathedral, including the vicars choral, from the year 1660 to the present time, but continuously from the year 1682 only. The schedule annexed to the case, and which is to be taken as forming part thereof, contains the dates of admissions of the several vicars choral to their offices respectively, and the dates of certain of the leases granted by them, as extracted from the said muniment books, and from the register of leases before mentioned.

On the 19th of July, 1847, James Shoubridge, the plaintiff, was admitted to a year of probation, and, on the 28th of July, 1848, in full, as vicar choral. The said several admissions of the plaintiff are in the usual form, and are as follows:—

"On Monday, the 19th day of July, 1847, before the Venerable William Hale Hale, clerk, Archdeacon of the Archdeaconry of Middlesex, and canon of the 4th canonry founded in the Cathedral Church of St. Paul, London, in the chapter-house of the said Cathedral Church, \*342] in the presence of Edward F. Jenner, notary public, deputy-registrar: A business of admitting James Shoubridge to a year of probation for the office or place of a vicar choral in the Cathedral Church of St. Paul, London: on which day and place appeared personally

the said James Shoubridge, and alleged, that, on the day aforesaid, he had presented himself in the chapter-house of the Cathedral Church aforesaid, to the said venerable William Hale Hale, and humbly prayed to be admitted to a year of probation for the place or office of one of the vicars choral in the said Cathedral Church, according to the statutes and customs thereof: And thereupon the said venerable William Hale Hale, by and with the consent of the rest of the chapter of the said Cathedral Church, received and admitted the said James Shoubridge to a year of probation, to exercise the said place or office of a vicar choral of the said Cathedral Church; and decreed a stall to be assigned to him in the choir, according to the ancient customs hitherto used in the like cases, in the said church, and now approved of; he having subscribed the articles usually subscribed on this occasion, and taken the oaths of allegiance, supremacy, and clerical obedience, and of faithfully executing the office aforesaid, for a year of probation,—reserving a power, nevertheless, to the dean and chapter aforesaid, and their successors, of fully admitting the said James Shoubridge after his year of probation shall be completed, or of refusing him if in the mean time he shall behave himself unworthy of the said office.”

“On Friday, the 28th day of July, 1848, before the venerable William Hale Hale, clerk, canon of the 4th canonry founded in the Cathedral Church of St. Paul, London, in the chapter-house of the said Cathedral Church, in the presence of Edward F. Jenner, deputy-registrar: A business of admitting James Shoubridge to the office or place of a vicar choral of the Cathedral Church of St. \*Paul, London: [\*343 on which day appeared personally the said James Shoubridge, and alleged that he had duly completed his year of probation for the place and office of a vicar choral in the Cathedral Church of St. Paul, London; and thereupon humbly prayed to be actually admitted to the said place and office: wherefore the said venerable William Hale Hale, at the petition of the said James Shoubridge, in consideration of his having behaved himself laudably in his year of probation, did receive and actually admit him into the said office or place of a vicar choral of the said church according to the statutes and laudable customs thereof, he having first subscribed the articles usually subscribed, and declarations usually declared on this occasion, and taken the oaths of allegiance, supremacy, and canonical obedience to the dean and chapter of the said Cathedral Church, and their successors, and of observing the statutes as far as they concerned him as a vicar choral, and also of faithfully executing the said office assigned him, to be installed by the succentor or one of the minor canons of the said church.”

On the 1st of March, 1848, a lease for twenty-one years was executed by the defendant, described therein as pittansary, and John Goss, Thomas Francis, Charles Lockey, and William Bayley, described therein



as vicars choral. [A copy of this lease was annexed to the case, and was to be taken as part thereof.]

The emoluments enjoyed by the vicars choral of St. Paul's Cathedral are derived from the following sources, viz. annual rents reserved by leases of houses in Ludgate Street and Ave Maria Lane, London, fines on renewal of such leases every fourteenth year, annual rents or sums reserved and made payable under leases of certain lands at Halstead in Essex, and of the before-mentioned rectory and lands at Steeple Bumpstead, Essex, fines on renewal of such leases every seventh year, \*844] a certain \*yearly stipend in lieu of obits, and certain fees not material to this case.

The vicars choral have always been accustomed to receive, and have received, an equal share of the said rents or sums reserved and made payable under leases, yearly stipend in lieu of obits, and fees, during their year of probation: and the plaintiff, during his year of probation, duly received one-sixth part of such last-mentioned emoluments as accrued to the vicars choral during that year.

The following affidavit was made in this cause by the defendant:—

“Richard Clark, of, &c., the defendant above-named, maketh oath and saith, that he this deponent is a vicar choral and pittanceary of the vicars choral of the Cathedral Church of St. Paul, London, and that he was elected as such pittanceary on the 16th of April, 1852; that the duty of such pittanceary is, and has been for many years past, to collect and receive, on behalf of himself and the other vicars choral of St. Paul's Cathedral Church aforesaid, the rents of the estates belonging to the said vicars choral, and certain fees payable to them, and to pay over and divide the same quarterly: that he has in his possession as such pittanceary certain expired leases of the said estates, a copy of the tithe-commissioners' survey of one of such estates, situate at Steeple Bumpstead, in Essex, with plans of the said estate, and five books marked respectively 1, 2, 3, 4, 5, and called the pittanceary's books, which have been for many years past kept by such pittanceary for the time being, for the purpose of entering therein accounts of the rents and fees collected and received by him as aforesaid, and the payments and division thereof by this deponent and his predecessors, as pittancearies, together with the acknowledgments of such payments signed by the said vicars choral, and being the discharge of this deponent and his \*predecessors therefor: that, save as aforesaid, this \*845] deponent does not hold or have in his control any deeds, documents, books of account, books of entry, copies of deeds, grants, orders, copies of grants and orders, or other papers as pittanceary of the vicars choral of St. Paul's Cathedral aforesaid.”

The said books were produced at the trial; and the following is an extract from the first page of one of such books, marked “A. No. 1.”—

“A copy of the revenues, profits, and incomes belonging to the

vicars chorall of St. Paul's, London, done by Benjamin Payne, pittansary, anno 1695." Admitted a vicar February 18th, 1683-4.

The following are extracts from the books:—

"That, if any of the vicars' places be att any time vacant, as sometimes it doth happen, that then and in that case the dean and chapter putts that money up for the good of succession, of which the vicars has had no account for many years last past."

"Be it remembered, there was in Mr. Houghton's hands, the chapter-clerk, &c., 75*l.* and more detained out of Elidad Blackwall's fine, 20*l.* for the rectory of Halstead, due to the minor canons and the vicars chorall, of which with other moneys we prayed our several proportions at a full chapter, wherein Dr. Edward Stillingfleet presided, who was then dean, who told sub-dean Smith and the rest of us then present, that it was in the dean and chapter's breast when to account of it, and how to dispose of the same for the good of succession; to which answer we humbly did acquiesce, and have remained silent ever since; but have had no stop put upon any part of a fine since that time by any other succeeding dean."

"Know ye, that, before the fire of London, those houses in Ave Mary Lane were the incumbents' houses \*belonging to the six vicars chorall, to dwell in, as by the statutes of the church doth [\*346 plainly appear, and could not have been let from them to any other use: and the said vicars before the fire, did live there accordingly. But, since the said fire, they being not able to rebuild, leased out the ground, as is before rehearsed, to those several persons above mentioned and named, reserving only that small tenement of Mr. Bremridge's to build upon their own accounts."

"Steeple Bumstedd, in Essex,

"Is in the tenure and occupation of Sir John Bendish, knt., for which he pays to the vicars chorall 12*l.* a year, payable half-yearly, viz. at the feast of St. John, Baptist, and at Christmas, 6*l.* at each time: his lease was renewed April 15th, 1695.

"Note, that Lady Bendish, the relict of Sir Harry Bendish, deceased, renewed her lease with the vicars chorall of St. Paul's church, London, June 26th, 1729, for 150*l.*; the seven years being lapsed was obliged to pay this sum."

"Mr. Charles King admitted to the office and place of a vicar chorall in the Cathedral Church of St. Paul's according to the statutes and customs of the said church, October 31st, 1730."

"December 22d, 1743. Mr. Robert Wass was admitted a vicar chorall in the Cathedral Church of St. Paul, London."

"June 26th, 1747. This day the dean and chapter, pittansary, and vicars chorall, granted a concurrent lease of Steeple Bumstead, in Essex, to Mr. John Freke (in trust), which said lease is reposit in the chapter-house by Mr. Lever, our register. CHARLES KING."

"Mr. William Savage was admitted a vicar choral in St. Paul's Cathedral, April 5th, 1748."

"April 13th, 1748. Met this day, agreeable to the late order in 1746, in order to choose a pittanciary in the room of Mr. King, deceased; \*347] when were present \*Mr. F. Rowe, Mr. D. Cheriton, Mr. T. Baildon, Mr. William Savage, Mr. Robert Wass : Accordingly Robert Wass was chosen for the year 1748."

"1748. June 25th. This day Mrs. Washbourne renewed Halstead lease, adding seven years; to which the vicars chorals' share, according to the proportion of thirteen to eight, comes to . . . 102 10 2

"The minor canons' . . . . . 68 1 6

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"Total £165 11 8"

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"1748. June 25th. Paid the vicars choral their equal dividend of Mrs. Washbourne's fine, which is, to each man 17l. 1s. 8d.

"Received by me . . (Paid) . . . 17 1 8

"by me . . (Paid) . . . 17 1 8

"by me . W. Savage, . . . 17 1 8

"by me . D. Cheriton . . . 17 1 8

"by me . T. Baildon . . . 17 1 8

"by me . R. Wass . . . 17 1 8

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£102 10 0

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"Remains . . . 0 0 2"

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"1748. June 25th. This day Mr. Hurt renewed his lease of a house in Ludgate Street, adding ten years, for which he paid 22l."

"1748. June 25th. Paid the vicars choral their equal dividend of Mr. Hurt's fine, which is to each man 8l. 13s. 4d.

"Received by me . . (Paid) . . . 8 13 4

"by me . . (Paid) . . . 8 13 4

"by me . D. Cheriton . . . 8 13 4

"by me . . . . . 8 13 4

"by me . R. Wass . . . 8 13 4

"by me . T. Baildon . . . 8 13 4

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"£22 0 0"

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\*"April 6th, 1750. Met this day, according to the late order, \*348] in the choice of a pittansary, when Mr. Savage was chosen, agreeable to the same. THOMAS BAILDON, pittansary, FRANCIS ROWE, WILLIAM SAVAGE."

"Met this 27th day of May, at Sam's Coffee House. Agreed, that Mr. Rowe, pittansary, have leave to agree with Mr. Savage on his renewal, for 30 guineas, or 30*l*. D. CHERITON, D. CHERITON for Messrs. WASS and BAILDON, WILLIAM SAVAGE, WILLIAM SAVAGE for Dr. GREENE, FRANCIS ROWE."

"28th May, 1753. Met this day, according to our agreement with Mrs. Ashton Parker to renew her lease of a house in Ludgate Street, now in the occupation of Mr. Thomas Hayes; for which she paid 54*l*., and at the same time allowed us the guinea for extra trouble, as mentioned in our pittanciary-book to Dowbiggin and Laber, Michaelmas quarter, 1752."

"28th May, 1753. Received of Robert Wass, pittansary, the sum of 9*l*., being my share of the aforesaid 54*l*."

"By me, R. Wass (for Dr. Greene)	.	.	.	9	0	0
"me, R. Wass (for T. Baildon)	.	.	.	9	0	0
"me, D. Cheriton	.	.	.	9	0	0
"me, Francis Rowe	.	.	.	9	0	0
"me, R. Wass (for self)	.	.	.	9	0	0
"W. Savage	.	.	.	9	0	0

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£54 0 0"

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"22d January, 1756. Mr. John Jones was admitted organist, and the next day (23d) was sworn in vicar choral."

"January 27th, 1757. Mr. John Jones was, after his year of probation, admitted and confirmed vicar choral. D. CHERITON, pittancer."

"Met this 17th of May, 1757, to renew Sir Stephen Anderson's lease of Steeple Bumpstead, in Essex, eight \*years being lapsed at Lady-Day, 1749, to Lady-Day, 1757; for which he paid the [\*849 sum of 150*l*. to the six present vicars choral, as follows:—

"Robert Wass, pittanciary	.	.	.	25	0	0
"David Cheriton	.	.	.	25	0	0
"Thomas Baildon	.	.	.	25	0	0
"William Savage	.	.	.	25	0	0
"Robert Hudson	.	.	.	25	0	0
"John Jones	.	.	.	25	0	0

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£150 0 0

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"June 2d, 1758. On this day the body met to renew Mr. Tim's leases for the two houses in Ludgate Street, and did renew upon the terms following,—for ten years commenced at Lady-day; so that a year was allowed him, in consideration of extraordinary repairs; so that eleven years had elapsed at the time before mentioned:—

"Thomas Baildon's share (pittansary)	.	.	12	0	0
"Robert Wass	.	.	12	0	0
"William Savage	.	.	12	0	0
"Robert Hudson	.	.	12	0	0
"John Jones	.	.	12	0	0
					<hr/>
					£60 0 0

"June 2, 1758. On this day the body met, and renewed with Mr. Hurt for 22l. Ten years, commencing at Lady-Day last:—

"Thomas Baildon, pittansary	.	.	4	8	0
"Robert Wass	.	.	4	8	0
"William Savage	.	.	4	8	0
"Robert Hudson	.	.	4	8	0
"John Jones	.	.	4	8	0
					<hr/>
					£22 0 0

\*[350] "January, 1795. Moneys received for vicars choral of St. Paul's, by Robert Hudson, due at Christmas last past, 24l. 5s. N. B. Received at the same time from Sir Charles Talbot two alienation fines, the one for Mr. Bishop's house, let to Mr. Fisher, 1l.; the other for Mr. Reynolds', he made to Mr. Smith, 1l.: total, 26l. 5s.

"Renewed the lease of Steeple Bumpstead for twenty-one years from Christmas, 1847. The fine 1100l. amongst the following five members vicars choral, divided as follows, deducting the bill of Mr. Withall . . . . . 11 0 0  
 "Two guineas each towards building a school there . 10 10 0

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£21 10 0

"Leaving 1078l. 10s. to be divided into five shares, as follows:—

"Richard Clark	.	.	215	14	0
"John Goss	.	.	215	14	0
"Thomas Francis	.	.	215	14	0
"Charles Lockey	.	.	215	14	0
"William Bayley	.	.	215	14	0

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£1078 10 0

"RICHARD CLARK, Pittansary.

"Mr. Shoubridge in his year of probation."

The foregoing entry is in the handwriting of the defendant.

The lease referred to in the foregoing entry is that of the 1st of March hereinbefore mentioned, and annexed to the case.

The sum of 1100*l.* mentioned as the sum received on the execution of the lease last mentioned, was paid by the lessees to Christopher Hodgson, Esq., the clerk to \*the dean and chapter of St. Paul's Cathedral, and by him handed over to Mr. Withall, the attorney [\*351 in this action, who was also solicitor to the vicars choral.

The said Mr. Withall, without any directions from the defendant, drew five checks upon his bankers in favour respectively of the said Messrs. Goss, Francis, Lockey, Bayley, and the defendant, being the five of the vicars choral; each of the said checks being for the sum of 215*l.* 14*s.*

No part of the said sum of 1100*l.* was at any time paid to the plaintiff.

The minor canons of St. Paul's Cathedral are, like the vicars choral, appointed for a year of probation, previously to their being admitted in full.

In 1846, a lease of the rectory of Halstead was executed, and the fine upon renewal of the lease was divided amongst eleven minor canons, to the exclusion of a twelfth minor canon, then in his year of probation.

The several books hereinbefore mentioned as muniment-books, registers of leases, and pittansary's books, were to be deemed part of the case; and each party was to be at liberty to refer to any part thereof.

The question was,—whether the plaintiff was entitled to recover.

If the court were of opinion that he was *not*, then the verdict was to be entered for the defendant.

If the court were of opinion that the plaintiff *was* entitled to recover, the verdict was to be entered for him for the sum of 183*l.* 6*s.* 8*d.*, or the sum of 36*l.* 13*s.* 4*d.*, as the court should direct.

The court to have power to draw all such inferences of fact as it would have been competent and proper for a jury to draw.

The following is the schedule referred to in the case, *antè*, p. 341:—

\*352]

## \*SCHEDULE.

Names of Vicars Choral.	When admitted to Probation.	When in Full.	Date of Leases.	Lessors.
Cookney Dagnall Morris Simpson	1661, June 28 1661, June 28 1661, June 28 1661, June 28	No entry.	1661, July 10  1662, May 15 (3 leases) 1662, Aug. 20 1663, May 13 1666, May 7 1669, July 14 1677, Mar. 19 1680, May 4	Bryan, Jowett, Cookney, Dagnall, Morris, and Simpson, described as Vicars Choral. Bryan (pittansary), Jowett, Cookney, Morris, Simpson, Dagnall, and Masters, Vicars Choral. Bryan (pittansary), Jowett, Cookney, Morris, Simpson, and Joseph Masters, Vicars Choral. Bryan (pittansary), Cookney, Morris, Simpson, and Masters, Vicars Choral. Cookney (pittansary), Bryan, Linacre, and Reade. Reade (pittansary), Linacre, Lowe. Reade (pittansary), Linacre, Lowe. Linacre (pittansary), Lowe.
Payne Rayner Playford Spicer Oldham Turner Hart Blackwell	1682, Feb. 5 1682, Mar. 12 1682, Mar. 12 1686, Feb. 7 Same date Same date Same date Same date	1683, Feb. 18 1693, Mar. 13 1683, Mar. 13 1687, Feb. 21 1687, Feb. 21 Same date Same date Same date	1686, Oct. 11 1687, Sept. 22  1693, Nov. 3 1695, April 11	Payne (pittansary), Rayner, and Playford, Vicars Choral. Payne (pittansary), Oldham, Spicer, Blackwell, Turner, and Hart, Vicars Choral. { Payne (pittansary), Oldham, Spicer, Blackwell, Turner, and Hart, Vicars Choral.
Edwards Howell Clark	1696, Jan. 4 1697, Nov. 26 1699, June 6	1698, Nov. 21 No entry. 1705, Oct. 13	1700, Oct. 19	Turner, Edwards, Howell, and Clark, and one Elford, Vicars Choral.
Freeman	1701, Jan. 19	No entry.	1701, Nov. 6  1701, Nov. 6 1702, Nov. 3  1703, 1 lease 1704, 2 do. 1705, 1 do. 1707, Jan. 16	Spicer (pittansary), Turner, Edwards, Howell, and Clark, and said Elford, Vicars Choral. Spicer (pittansary), Turner, Edwards, Howell, and Clark, and said Elford, Vicars Choral. Spicer (pittansary), Turner, Edwards, Howell, Clark, and Freeman, Vicars Choral. Do. do.
				Spicer (pittansary), Turner, Edwards, Howell, and Freeman, Vicars Choral.

Names of Vicars Choral.	When admitted to Probation.	When in Full.	Date of Leases.	Lessors.
Hughes Brind Weeley	1708, Sept. 28 1710, Mar. 4 1710, June 9	1710, June 9 No entry. 1717, Mar. 20	1711, Jan. 1  1712, March 5 1712, July 15	Edwards (pittansary), Turner, Freeman, Brind, Weeley, and Hughes, Vicars Choral.  Same Lessors. Turner, Freeman, Brind, Weeley, and Hughes, Vicars Choral.
Greene	1717, Mar. 20	1733, Jan. 16	1718, July 15, and between that day and 1729, July 26, 13 leases were executed by	Edwards (pittansary), Turner, Freeman, Weeley, Hughes, and Greene, Vicars Choral.
King	1730, Oct. 31	1733, Jan. 16	1733, Jan. 16 (2 leases)	Freeman (pittansary), Turner, Hughes, Weeley, Greene, and King, Vicars Choral.
Chelsum Rowe	1736, Mar. 24 1739, Jan. 24	1737, Mar. 15 1740, Mar. 7	1740, April 18	Chelsum (pittansary), Hughes, Weeley, Greene, King, and Rowe, Vicars Choral.
Cheriton Wass Baildon	1743, Nov. 11 1743, Dec. 22 1744, Mar. 31	1744, Nov. 8 1763, Mar. 26 No entry.	1746, May 7  1747, May 1 (2 leases) 1747, June 26 1748, Feb. 22  1748, June 24 1748, June 25 1753, May 28 1753, Nov. 29 1755, July 5	King (pittansary), Greene, Rowe, Cheriton, Wass, and Baildon, Vicars Choral.  Same Lessors. Same Lessors. Wass (pittansary), Greene, Rowe, Cheriton, Baildon, and Savage. Same Lessors. Same Lessors. Same Lessors. Same Lessors. Savage (pittansary), Greene, Che- riton, Wass, and Baildon, Vicars Choral.
Savage	1748, April 5	1763, Mar. 26	1756, June 23 1757, Feb. 22	Cheriton (pittansary), Wass, Bail- don, and Savage, Vicars Choral. Wass (pittansary), Cheriton, Bail- don, Savage, Hudson, and Jones, Vicars Choral.
Hudson Jones	1755, Nov. 22 1756, Jan. 23	1756, Nov. 23 1757, Jan. 26	1758, June 2 (3 leases)	Baildon (pittansary), Wass, Sa- vage, Hudson, and Jones, Vicars Choral.
Cooper	1758, Jan. 14	1759, Jan. 22	1763, Mar. 26	Cooper (pittansary), Wass, Savage, Hudson, and Jones, Vicars Choral.
Price Clarke	1762, Nov. 16 1762, Dec. 25	Resigned. 1764, Mar. 30		



Names of Vicars Choral.	When admitted to Probation.	When in Full.	Date of Leases.	Lessors.
Soaper	1764, April 26	1765, May 25	1764, Nov. 30	Savage (pittansary), Hudson, Jones, Cooper, and Clarke, Vicars Choral.
			1765, Nov. 18	Hudson (pittansary), Savage, Jones, Cooper, Clarke, and Soaper, Vicars Choral.
Ayrton	1767, Dec. 23	1769, Jan 4	1768, July 30	Soaper (pittansary), Savage, Hud- son, Jones, and Cooper, Vicars Choral.
Dyne	1772, Feb. 3	1773, Feb. 4	1773, Feb. 6	Jones (pittansary), Savage, Hud- son, Soaper, Ayrton, and Dyne, Vicars Choral.
Bellamy Gore	1777, April 5 1788, Dec. 17	1778, April 6 1789, Dec. 18	1789, Feb. 16	Bellamy (pittansary), Hudson, Jones, Soaper, and Ayrton, Vicars Choral.
			Same Date 1789, Feb. 18	Same Lessors. Same Lessors.
Sale Attwood Page	1794, June 23 1796, Mar. 21 1801, Jan. 10	1795, June 25 1797, Mar. 30 No entry.	1801, May 27 1801, Oct. 23 1801, " " 1802, June 29	Ayrton (pittansary), Hudson, Gore, Sale, and Attwood, Vicars Choral. Gore (pittansary), Hudson, Ayr- ton, Sale, Attwood, and Page, Vicars Choral.
Neeld	1808, Aug. 23	1809, Nov. 6	1812, Jan. 7	Gore (pittansary), Hudson, Ayr- ton, Sale, Attwood, and Page, Vicars Choral.
Hawes	1813, Jan. 5	1814, Jan. 5	1813, May 8	Neeld (pittansary), Hudson, Gore, Sale, and Attwood, Vicars Choral.
			1813, Nov. 25	Sale (pittansary), Hudson, Gore, Attwood, and Neeld, Vicars Choral.
Goss, J. J.	1815, Dec. 30	1817, Jan. 21	1816, June 24	Sale (pittansary), Gore, Attwood, Neeld, and Hawes.
Vaughan	1817, May 9	1818, May 28	1817, Oct. 6 1817, " 23 1817, " 24	Same Lessors.
Clarke (Defendant)	1827, Dec. 10	1828, Dec. ad- mission had and act en- tered, but not completed.		
Goulden	1831, June 13	1832, July 9	1831, Dec. 16 1833, Nov. 30	Hawes (pittansary), Attwood, Neeld, Vaughan, and Clark. Defendant (pittansary), Hawes, Attwood, Neeld, Vaughan, and Goulden, Vicars Choral.

Names of Vicars Choral.	When admitted to Probation.	When in Full.	Date of Leases.	Lessors.
Goss, John	1838, May 1	1839, May 29	1839, Feb. 25 " Mar. 25 (3 leases)	Hawes (pittansary), Neeld, Vaughan, Goulden, and Clark, Vicars Choral.
Francis	1841, Feb. 4	1842, Feb. 10	1841, March 3	
Lockey Bayley	1843, Mar. 16	1844, April 9	1841, April 26	Defendant (pittansary), Hawes, Neeld, Vaughan, and Goss. Same Lessors.
	1843, Mar. 29	1844, April 9	1843, July 7	Defendant (pittansary), Hawes, Goss, and Francis.
Shoubridge (Plaintiff)	1847, July 19	1848, July 28	1846, May 28	Defendant (pittansary), Hawes, Goss, Francis, Lockey, and Bayley, Vicars Choral.
			1848, March 1	Defendant (pittansary), Goss, Francis, Lockey, and Bayley.

*Manning*, Serjt. (with whom was *Sumner*), for the plaintiff.—The question is, whether the plaintiff, a vicar choral of St. Paul's Cathedral, is, during his year of probation, entitled to participate in a sum of 1100*l.* which had been paid by a lessee of lands belonging to the body, upon the renewal for a term of years theretofore customarily granted by the dean and chapter and the vicars choral. The case shows, that, from the year 1660 down to 1756, or a little later, the course has been uniform: during that period, sixteen leases appear to have been granted, at the time of granting which there were probationers, and in all those cases the probationer \*was a party to the lease. In July, 1661, [\*357 there is an entry of a lease having been granted, four who were probationers joining in it. In 1687, also, a lease was granted by Payne, Oldham, and four others who were probationers; Spicer and the other three having been admitted to probation in February, 1686–7 (old style), nine months before. On the 19th of October, 1701, Clark executes as a co-lessor; not being admitted in full until October, 1705. Spicer appears not to have been a party to this lease, though he joined in the years 1699 and 1701. Such was the course down to the year 1756; from which time downwards none of the probationers appear to have been parties to any leases. The present plaintiff was admitted a probationer on the 19th of July, 1847, and a full vicar choral on the 28th of July, 1848. The lease in respect of which the fine in question was taken was granted on the 1st of March, 1848, by the dean and chapter of St. Paul's, Clark, the now defendant, as pittansary, and Goss, Francis, Lockey, and Bayley, then vicars choral. These had no right by taking a fine to anticipate the profits that would as rent be divisible amongst the body. In *Taylor d. Atkyns v. Horde*, 1 Burr. 60,—where it was held that the limitation of estates by virtue of powers must be strictly pursued,—Lord Mansfield, in the course of his judg-

ment, says, p. 121 :—"There are *two* methods of leasing in common use in this kingdom,—at the best rent,—and upon fines, which, as the lives or leases drop, are considered among the *annual profits*. This power is always adapted to *both*. It is inserted in almost every strict settlement of every kind. The nature and view of a power, so usually given, is well understood; and courts of justice have always looked with a jealous eye, to see that the conditions in favour of the next taker be pursued, not literally only, but substantially. It is not sufficient that the ancient rent be reserved; it must be reserved with all the \*358] *beneficial circumstances*. If payable before at four, it cannot be reserved at two payments; Lord Mountjoy's Case, 5 Co. Rep. 5 b. The whole rent must be payable annually during the whole term. In that case, it was holden 'that less could not be reserved even to the lessor himself during his own life.' One of the reasons in Elmer's Case, 5 Co. Rep. 2, shows the rent must be payable annually during the term. In the case of Lady Charlotte Orby v. Lady Mohun, 2 Vern. 531, 542, Lord Cowper, Holt, and Trevor, all three held clearly that a lease 'reserving the *best rent*,' though good against an owner of the inheritance, was *void under a power*: and Cowper and Trevor held, that reserving the '*ancient rent*,' where lands had been usually demised, though good and certain enough, by reference, against an owner of the inheritance, was *void under a power*, because it put the remainder-man *under difficulties* in avowing. 'The intent was,' say they, 'that the tenant for life in possession might lease; so it was, on the other hand, that the revenue should not be diminished, but the ancient rent, at least, reserved, and in *such beneficial manner* as might with certainty, and without any difficulty, be recovered.' 'The question here is not,' say they, 'whether the lease is void for uncertainty, as between the lessor and lessee; but whether *all requisites* are observed, and *such beneficial clauses and reservations* as ought to have been, for the benefit of a third person, the remainder-man.'" And see Doe d. Newnham v. Creed, 4 M. & Selw. 371.

Sir A. Cockburn (with whom was Wordsworth), *contra*.—Three questions arise in this case,—first, whether the custom upon which the plaintiff relies has any existence,—secondly, whether, if it exists, it is maintainable in point of law,—thirdly, whether an action for money \*359] had and received will lie; and, if so, for what amount. \*Down to the year 1756, the entries set out in the case are ambiguous: but, for the last hundred years, the usage has been uniform and uninterrupted, that probationers took no share of the fines paid for the renewal of leases. Thus, in 1756, when Hudson and Jones were respectively in their year of probation, the leases were granted by the other four vicars choral only: but, in 1757 and 1758, when both those persons were admitted as full vicars choral, they join in the leases. So, in the case of Cooper, who was admitted as a probationer in January,

1758, he is no party to the lease in June, 1758. Many other cases occur in which, leases being granted during the year of probation, the probationer is no party. [MAULE, J.—I think we may take it that the power and the right have not been exercised by the probationers from 1756 downwards.] During the year of probation, they shared in the minor profits, but not in the fines. There is nothing unreasonable in this arrangement; and it is a custom which is not peculiar to the Cathedral of St. Paul. Where a custom is found to have been existing beyond the memory of man, a legal origin is presumed. [MAULE, J.—If there is any substantial difference between the emoluments of a probationer and a full vicar choral, it seems strange that there should sometimes be so great a lapse of time between the admission as probationer and the admission in full.] That is a circumstance that is not easily accounted for. Green seems by the schedule to have been admitted a probationer on the 20th of March, 1717, and as full vicar choral on the 16th of January, 1738—apparently for the very purpose of executing the two leases dated on that day. [CRESSWELL, J.—How do you account for his having been a party to the execution of thirteen leases in the interval?] He may have been joined for the sake of caution,—to satisfy the scruples of some conveyancer.

\*Assuming that the plaintiff is entitled to participate in the fines, this action for money had and received is not maintainable. [\*360] The fine was received by Mr. Hodgson, the chapter-clerk, who handed it over to the solicitor acting for the vicars choral. The defendant, Clark, as pittanceary, keeps the accounts; but the money never came to his hands at all,—the distribution being made by the solicitor, acting, not on behalf of the pittanceary, but on behalf of the whole body. At all events, the defendant can only be responsible to the extent of the excess which he has received beyond his just share, assuming the plaintiff to be entitled to one-sixth of the fine. [MAULE, J.—It is just as if the money had been received by all the five vicars choral; in which case, if one is sued, he must plead in abatement.] Mr. Hodgson received the money to the use of the lessors named in the lease: the plaintiff was not one of them. [MAULE, J.—When the money came to the hands of the solicitor, and before he made the distribution, he had received it on account of the plaintiff with the others, supposing the plaintiff entitled to a share. There can be no doubt about it. The five vicars choral, to the exclusion of the plaintiff, he being in his year of probation, have (lawfully or otherwise) been exercising the right to grant a lease and to receive the fine. Their attorney, acting upon a certain view of their rights, has received the money for them: it is as if they had all received it jointly. If a portion of it belonged of right to the plaintiff, he might sue all the five or any one of them; in which latter case, the defendant would have to plead in abatement. [JERVIS, C. J.—The right to maintain money had and received is quite clear.]

*Manning*, Serjt., in reply.—This is a freehold office, from which the plaintiff could not be removed even during his year of probation. \*361] [JERVIS, C. J.—It was held \*otherwise, upon appeal, in the Chester Choir case.] All the vicars choral, whether on probation or in full, perform the same services and duties; and there is no reason why their remuneration should be different. Referring to the schedule annexed to the case, it will be found, that, from the year 1661 down to 1755, there are no less than forty-two instances in which one or more of the probationers have joined in granting leases; and no single instance occurs within that period of one omitting to join. [JERVIS, C. J.—What has been the course with respect to Steeple Bumpstead?] Prior to 1755, the probationers joined in leases and participated in fines. There are only two instances of fines being received since 1755,—one, which occurred at a time when there was no one in probation,—the other, the instance now in question. [JERVIS, C. J.—There must have been several renewals since 1755; and there is a general statement in the case that probationers did not participate in fines.] The probationer's right to the annual rent is conceded; and, in the absence of cogent evidence to the contrary, it follows that he is in law entitled to participate in fines on renewals. Upon the whole, it is submitted that the plaintiff is entitled to recover against the defendant a sixth share of the sum in question.

JERVIS, C. J.—I am of opinion that the defendant in this case is entitled to the judgment of the court. It appears, that, for the last hundred years, those who were in the position of this plaintiff, viz. in their year of probation, preparatory to their admission to the rights appertaining to full vicars choral, have received an equal share with their brethren of the rents of property belonging to the body, and of the rents only; and that they have not during that period participated in any fines paid for renewals. That being so, it is the duty of the \*362] court to presume that the discontinuance of the \*payment to probationers of a share of such fines has had a legal origin. There is abundant evidence in the case to justify us in coming to this conclusion. It would seem that down to the year 1755 or 1756, probationers have joined in executing leases: but, from that time to the present, the practice has been otherwise. The only question, therefore, is, whether this practice could have a legal origin. As far as concerns Steeple Bumpsted, such legal origin may fairly be presumed. There may have been some general order or regulation of the dean and chapter excluding probationers from participation in fines. It is the duty of the court to presume that which will support a long and uniform course of practice, where there is nothing to show it to be unreasonable or unjust. Upon this short ground, therefore, I am of opinion that the defendant is entitled to our judgment.

MAULE, J.—I entirely concur with what has fallen from the Lord

Chief Justice : and my Brother Talfourd, who has been obliged to leave the court, desired me also to express his concurrence.

CRESSWELL, J., said nothing.

Judgment for the defendant.

**\*FISHER and Another v. BELL and Another. June 12. [\*863**

A deed of arrangement between an insolvent trader and his creditors, under the 224th section of the 12 & 13 Vict. c. 106, is not binding upon those creditors who have not executed it, unless it provides for the *entire distribution* of the trader's estate and effects amongst his creditors, as in bankruptcy.

THIS was an action of assumpsit by the plaintiffs as drawers of certain bills of exchange, against the defendants as acceptors. The declaration also contained counts for goods sold and delivered, for money paid, and for money found due upon an account stated.

Sixth plea,—that, at the time of the making of the indenture thereafter mentioned, and for six calendar months and upwards before the suspension of payment by the defendants thereafter mentioned, the defendants were traders in copartnership, to wit, merchants, dealers, and chapmen, liable to the bankrupt laws, and were jointly indebted to the several persons parties to the said indenture of the third part, and to divers other persons, in divers sums of money which the defendants were unable to pay in full : that, before the making of the said indenture, and after the passing and coming into operation of “The bankrupt-law consolidation act, 1849,” to wit, on the 14th of April, 1851, they the defendants being such traders as aforesaid, suspended payment, and thereupon, afterwards, to wit, on the day and year last aforesaid, by a certain indenture then made, and bearing date a certain day and year, to wit, the day and year last aforesaid, between the defendants of the first part, one George Marshall of the second part, and the several persons whose names and seals were thereunto subscribed and affixed, respectively being joint-creditors, or agents or attorneys of joint-creditors, of the defendants, of the third part,—after reciting that the defendants, as such copartners in trade as aforesaid, were jointly indebted to the several persons parties thereto of the third part, \*in the several [\*864 sums of money set opposite to their respective names in the schedule thereunder written, which they were unable to pay in full ; and that the said George Marshall had, upon the application and request of the defendants, consented and agreed to secure to the said several persons parties thereto of the third part, the sum of 7s. 6d. in the pound on the amount of their said respective debts, upon having such assignment made to him as thereafter mentioned and contained ; and reciting that the said several creditors parties thereto of the third part had consented and agreed to accept the said sum of 7s. 6d. in the pound upon the amount

of their respective debts, in full satisfaction and discharge thereof, and to release the defendants therefrom, on having such security from the said George Marshall as thereafter mentioned,—they, the defendants, in pursuance and performance of the said recited agreement, and for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto the said George Marshall, his executors, administrators, and assigns, all and singular the joint copartnership stock in trade, goods, wares, and merchandise, debts, sums of money, bills, notes, securities, and vouchers of payments, and all other the joint copartnership estates, property, and effects of the defendants, of what nature or kind soever, and wheresoever situated or being, and in whosoever hands, custody, or power the same, or any of them, or any part thereof, then were, or at any time thereafter should or might come or be, with their and every of their rights and appurtenances, and all benefit and advantage of the same; and all the estate, right, title, and interest, property, claim, and demand whatsoever of them the defendants, and of each of them, therein or thereto; to hold the said stock in trade, goods, wares, and merchandises, securities, and all and singular other the property and premises thereinbefore assigned, or \*365] intended so to be, and every part thereof respectively, unto the said George Marshall, his executors, administrators, and assigns, as his and their own property, goods, and chattels, and for his and their only use, benefit, and advantage absolutely and for ever; and, in consideration of the premises, and of the assignment thereinbefore made, he the said George Marshall did by the said indenture, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said several persons parties thereto of the third part, in manner following, that is to say, that he, the said George Marshall, his executors or administrators, should and would well and truly pay or cause to be paid unto the said several persons parties thereto of the third part, the sum of 7s. 6d. of lawful British money in the pound for each and every pound of such lawful money as aforesaid of the said several debts in the said schedule to the said indenture contained, then due and owing to them the said last-mentioned persons from the defendants, by the instalments and at the times following, that is to say, one half part of the said composition on the expiration of three calendar months from the date of the said indenture, and the other half part thereof on the expiration of six calendar months from the date of the said indenture; for which said composition of 7s. 6d. in the pound on such debts as aforesaid (as was alleged in the said indenture), the said George Marshall had that day, to wit, on the said day of the date of the said indenture, given and delivered to each of the said several persons parties thereto of the third part, his promissory note, payable at the times and by the instalments thereinbefore mentioned; and by the said indenture all the said creditors parties thereto of the third part, did, in pursuance of the said agreement, and in consideration of the

covenant of the said George Marshall thereinbefore contained, for themselves severally and respectively, and for their several \*and [366  
respective executors, administrators, and partners, remise, release,  
and for ever quit claim unto the said defendants jointly, their heirs,  
executors, and administrators, all and all manner of action and actions,  
suit and suits, cause and causes of action and suit, judgment, execu-  
tions, extents, bills, bonds, notes, writings, obligations, covenants, debts,  
dues, duties, sum and sums of money, accounts, reckonings, quarrels,  
controversies, trespasses, claims, and demands whatsoever, which against  
the defendants jointly they the said several creditors ever had, or which  
they, or any of them, or their or any of their heirs, &c., or partners,  
could or might have, claim, challenge, or demand for or on account of  
any matter, cause, or thing whatsoever from the beginning of the world  
to the day of the date of the said indenture; subject, nevertheless, to  
the proviso next thereafter contained: and the said indenture con-  
tained a proviso that nothing therein contained should extend, or be  
construed to extend, to prejudice or affect, or to strengthen or extend  
to give greater validity to any mortgage, lien, or security which any of  
the said several creditors of the defendants then held for their respec-  
tive debts, or any part thereof respectively, nor to prevent the said  
creditors or any of them, their or any of their partners or partner, ex-  
ecutors, administrators, or assigns, from suing or prosecuting any per-  
son or persons other than the defendants, their heirs, &c., who were  
or should or might be liable to pay or make good to any of the said  
creditors all or any of their respective debts, either as drawers, endor-  
sers, or acceptors of any bill or bills of exchange or promissory note  
or notes, or being jointly or severally bound in any bond or bonds or obli-  
gations, or other instruments, or as being liable to pay such debts, or any  
part thereof, without having subscribed or executed any bill, note, bond,  
or other instrument whatsoever, as if the said indenture had not been  
made; nor \*from suing the said defendants jointly with any such [367  
person or persons, if necessary for the sake of conformity, they  
being indemnified in respect thereof by the creditors or creditor so suing  
them,—as by the said indenture, reference being thereunto had, would  
more fully appear: Averment, that, before the commencement of this  
suit, to wit, on the said 11th of April, 1851, to wit, at the time of the  
making of the said indenture, the same was subscribed and sealed by  
the defendants and the said George Marshall, and by divers, to wit,  
one hundred, of the said creditors of the defendants jointly, and by  
divers, to wit, one hundred, others of the defendants jointly, by their  
authorized agents or attorneys respectively,—profert: That the cre-  
ditors by whom or on whose behalf respectively the same was so sub-  
scribed and sealed as aforesaid, were six-sevenths in number and value  
of the creditors of the defendants, within the meaning of the said act,  
whose debts amounted to the sum of 10*l.* and upwards, accounting



every creditor of the defendants a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendants, appeared to be the balance due to them respectively: That the said indenture, so subscribed and sealed as aforesaid, was and is a deed of arrangement between the defendants and their creditors within the meaning of the provisions of the bankrupt-law consolidation act, 1849, as to arrangements by deed: That the plaintiffs, at the time of the making of the said indenture, were creditors of the defendants in respect of the causes of action in the declaration mentioned, within the meaning of the said statute; and that, at the time last aforesaid, the sums due in respect of the last-mentioned causes of action were debts due from the defendants jointly to the plaintiffs, within the meaning of the said indenture: That afterwards, to wit, on the 1st of \*368] May, 1851, the plaintiffs had notice, to wit, from the defendants, of the said suspension of payment by the defendants, and of such deed of arrangement as aforesaid, within the meaning of the said statute, and were then, to wit, on the day and year last aforesaid, requested, to wit, by the defendants, to subscribe and seal, and could then have subscribed and sealed, the said deed, as parties thereto of the third part: That three calendar months from the time of such last-mentioned notice had elapsed before the commencement of this suit: That the plaintiffs, after the making of the said indenture, and at all times thereafter until the commencement of this suit, and at all times since, might and could, if they would, have subscribed and sealed the said indenture as creditors of the defendants for the sum due in respect of the causes of action in the declaration mentioned, and as parties to the said indenture of the third part, and were before the commencement of this suit, to wit, on the day and year last aforesaid, requested, to wit, by the defendants, so to do: And so the defendants said, that, by force of the said statute, the said indenture, after the expiration of the period last aforesaid, and before the commencement of this suit, to wit, on the 1st of October, 1851, became and was effectual and obligatory in all respects upon the plaintiffs, as if they had duly subscribed their names and affixed their seals thereto; whereby the defendants had been and were released and discharged from the causes of action in the declaration mentioned,—verification.

To this plea, the plaintiffs,—craving oyer of the deed, and setting it out,—replied, that, before and at the time of making and executing the said indenture in that plea mentioned, each of the said defendants was possessed and entitled to divers goods, chattels, and effects, his own separate property, to a large amount, to wit, each to the amount of \*369] 1000*l.*, and liable to seizure under \*legal process, for and towards payment of the debts due to the joint creditors of the said defendants,—verification.

To this replication the defendants demurred generally.

*Channell*, Serjt., in support of the demurrer.—Two questions arise here,—first, whether the release set up by the sixth plea constitutes a valid release under the statute 12 & 13 Vict. c. 106, or whether it is open to the objection, that, though it appoints a trustee, and professes to discharge the defendants, it can legally so operate, inasmuch as it contains no assignment of the estate and effects of the defendants,—secondly, whether, supposing no assignment to be necessary, the deed is not inoperative quoad the separate estate of the defendants, and whether such separate estate is not still liable to seizure under a *fi. fa.* The construction of the clauses of the statute upon which these questions depend, has been the subject of discussion in *Drew v. Collins*, 6 Exch. 670,† in the Court of Exchequer, and in *Tetley v. Taylor*, 1 Ellis & B. 521, 21 Law J., N. S., Q. B. 2, in the Court of Queen's Bench. Those two courts came to opposite decisions; and the question now is, to which of those decisions this court will adhere. If the view taken by the Queen's Bench be adopted, the two points in effect become one; that court having held, that, if six-sevenths of the creditors whose debts amount to 10*l.* concur in the arrangement, it is binding, after the lapse of three calendar months, upon those creditors who do not come in, and therefore that it is no objection that the deed omits to provide for the assignment of separate estate. The material clauses of the act are the 224th, 225th, 226th, 228th, and 229th. Section 224 enacts, “that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, \*and signed by [†370 or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him.” Section 225 enacts “that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader

shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such \*371] application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby." The 226th section enacts that the trustee or inspector, &c., shall certify as to the proper number of creditors having signed, which certificate shall be filed, &c. The 227th section provides that an account of debts, &c., shall be annexed to such certificate, and be verified by the affidavit of the arranging debtor. Section 228 enacts "that the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed *in like manner as in bankruptcy*; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed." And section 229 provides, "that, if any creditor of any trader shall be desirous to show that the administration of the estate of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted; and thereupon the court shall have full power, and it is hereby fully authorized, to consider the subject-matter of such application, and, if it shall think fit, may direct any inquiry, and in such manner as it shall think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject-matter of such application, and the costs thereof, \*372] as to the said court shall appear just." \*Here, six-sevenths of the creditors whose debts amount to 10*l*. have executed the deed, but there is no assignment of the debtor's property: therefore, if the estate should realize more than enough to pay 7*s.* 6*d.* in the pound to all the creditors, the creditors would derive no benefit from the surplus. In *Phillips v. Surridge*, 1 L. M. & P. 458, 19 Law Journ., N. S., C. P. 337, the deed did contain an assignment of the debtor's property. And in *Stewart v. Collins*, 10 C. B. 684 (E. C. L. R. vol. 70), 2 L. M. & P. 61, either the deed is imperfectly set out in the plea, or the point was not

taken. It distinctly arose, however, in *Drew v. Collins*, 6 Exch. 670,† and the Court of Exchequer held that a deed of arrangement between an insolvent trader and his creditors, is not, under the 224th section of the statute, binding on the creditors who have not executed it, *unless it provides for the entire distribution of the trader's estate among his creditors*. Pollock, C. B., there says,—p. 688: “According to the true construction of the 224th section, if there be an arrangement by deed, a distribution must be made of the whole property; and, consequently, any deed which gives to the trader the surplus after payment of a composition, is not in conformity with the statute; so that the provisions of this deed are *ultrâ vires* what any number of creditors had a right to make obligatory on the rest. The 228th section is quite clear and distinct, that the distribution of the trader's property shall be according to the rule in bankruptcy; and if that overrides all arrangements by deed, as in my opinion it does, it must have been intended that in these cases there should be a *division* of the property, subject to such arrangement as the creditors may agree to; the object of that arrangement being, to avoid the costs of bankruptcy, and to facilitate the distribution of the property without an expensive machinery.” And Alderson, B., adds: “By this deed, six-sevenths of the creditors agree to distribute \*6s. 8d. in the pound on the debt of each creditor, and then give [373 the rest to the insolvent. Suppose he was able to pay 20s. in the pound, instead of 6s. 8d., would it be competent for six-sevenths of the creditors to give him the surplus? It is not necessary to put a construction on the act which would lead to such an absurdity, when by the 228th section the assets are to be distributed ‘in like manner as in bankruptcy.’ The only reasonable and proper construction of the statute is, that there can be no valid arrangement by deed, unless the whole of the trader's estate is distributed among his creditors.” The Court of Queen's Bench in the subsequent case of *Tetley v. Taylor*, 1 Ellis & B. 521 (E. C. L. R. vol. 72), took a different view of the statute, holding that a composition-deed executed by two sureties, by the defendant, a trader, and by six-sevenths of his creditors to the amount of 10l.,—not including the plaintiffs,—by which the defendant and his sureties covenanted to pay 7s. 6d. in the pound to each creditor, to be secured by notes of himself and sureties, and the creditors in consideration thereof released the defendant,—was binding upon the plaintiffs, under the 224th section of the act, although it did not provide for the distribution of the *whole* of the trader's estate. Lord Campbell, in giving the judgment of the court,—after reading the 224th section,—says: “It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors, or that they exclude a deed which allows him to remain in possession of them on payment of such a composition as is satisfactory to six-sevenths of his creditors, and on performance

of such other stipulations as they consider more for their advantage than forcing him into bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The section cautiously \*374] and \*anxiously guards against the supposition that the deed, to be protected, must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition-deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition, from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. A great power is certainly given to the six-sevenths in number and value of the creditors: but they can only place the remaining seventh in the same situation in which they have placed themselves; and it surely would not be imputing any absurdity to the legislature, the words employed by them naturally bearing such a meaning, if we suppose that they considered the risk of the six-sevenths in number and value of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies, was so small as not to deserve consideration, or, at least, to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur, until, by a clandestine bargain, their claims are fully satisfied." It is submitted that that judgment presents a just exposition of the views of the legislature. They evidently contemplated that the arrangement which would be satisfactory to so large a portion of the creditors as six-sevenths, would be the most beneficial one for the creditors at large. If that be so, the argument derived from the 228th section, that there \*375] is no provision made for the conveyance \*of the separate estates of the defendants, will not press. Here, the plaintiffs are joint creditors: the deed purports to convey to the trustee all the joint property of the defendants,—not, it is true, for the purpose of realizing the proceeds for distribution amongst the creditors: but Marshall, the trustee, makes himself personally responsible for the amount of the composition. The real question is, whether six-sevenths of the creditors may not lawfully bind the general body of creditors by a deed otherwise than for winding up. [JERVIS, C. J.—The history of these clauses is this: It was found by experience, that, when it became desirable that large mercantile firms should be wound up without having recourse to bankruptcy, certain obstinate creditors compelled the rest to submit to their being paid in full. To remedy this evil, the

clauses in question were drawn by Mr. Lavie, and were submitted to the House of Lords by Lord Brougham. The 224th section speaks of deeds of arrangements by a trader "*touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate*, or all or any of such matters:" do these words "or all or any of such matters" apply to the first of these things, or to the last? If they may apply to the first, to the exclusion of the last, there may be an arrangement between the trader and his creditors which does not necessarily involve the winding up of his estate. That view does not seem to have been adverted to in the Queen's Bench: but it may, nevertheless, be worth considering.] It is quite consistent with all the provisions of the act, that the arrangement contemplated may provide for the release of the trader from his liabilities, without interfering with the management of his estate. Composition-deeds were well known to the law before the passing of the act.

*\*Barstow, contra.*—Throughout this act, wherever the legislature is dealing with ordinary composition-deeds, it has in terms [\*376 said so. The deed now under consideration is one of a very extraordinary description. There is no trustee appointed, no surety: the general scope of it is, that the *joint property* of the defendants is sold to Marshall, who for that consideration engages to pay 7s. 6d. in the pound to each of their creditors; the debtors themselves not joining in the notes: and there is the personal covenant only of Marshall for the payment of the money. It is not even alleged that the composition was offered to the defendants. Such an arrangement is perfectly inconsistent with every provision in the act, and wholly beside the general policy of the bankrupt law. If there had been a bankruptcy, the joint-creditors would take the whole of the joint estate, and the surplus, if any, of the separate estate of each of the debtors. This deed professes to deal with the joint estate only. The 229th section, which gives a remedy to a creditor who is dissatisfied with what has been done, is important: it enacts, "that, if any creditor of any trader shall be desirous to show that *the administration of the estate* of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted; and thereupon the court shall have full power, and it is hereby fully authorized, to consider the subject-matter of such application, and, if it shall think fit, may direct any inquiry, and in such manner as it shall think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject-matter of such application, and the costs thereof, as to the said court

\*377] shall appear just." [JERVIS, C. J.—\*"Administration of the estate," seems there to be used as a generic term for "conduct, management, &c.," in section 224.] Exactly so. The case of *composition* "after adjudication of bankruptcy," is provided for by sections 230 and 231; but that is to take place after the bankrupt has undergone a scrutiny, and the consent of nine-tenths in number and value of the creditors assembled at a meeting called for the purpose is required; and strong terms of protection are thrown over creditors in that case.(a) \*Upon the whole, it is submitted that the court will adhere to the decision of the Court of Exchequer in *Drew v. Collins*, rather than to that of the Queen's Bench in *Tetley v. Taylor*, where the court seem not to have perceived the consequence of there being a possible surplus of separate estate to go in aid of the joint estate.

*Channell*, Serjt., was heard in reply.

JERVIS, C. J.—This point being now before the Exchequer Chamber, upon a writ of error in the case of *Tetley v. Taylor*, we will defer our judgment in this case until after that case has been disposed of.

*Cur. adv. vult.*

JERVIS, C. J., on a subsequent day,—June 21,—said: The court of error having reversed the decision of the Court of Queen's Bench in *Tetley v. Taylor*, and adopted that of the Court of Exchequer in *Drew v. Collins*,—see 1 Ellis & B. 521, 539 (E. C. L. R. vol. 72),—it follows that we must pronounce judgment for the plaintiffs in this case,—the deed relied on by the defendants not being a valid deed of arrangement within the 224th section of the 12 & 13 Vict. c. 106.

Judgment for the plaintiffs.

(a) Section 230 enacts "that any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors (whereof, and of the purport whereof, twenty-one days' notice shall be given in the London Gazette), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid; and, if, at such second meeting, nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication; and every creditor of such bankrupt shall be bound to accept of such composition so agreed to."

Section 331 enacts "that, in deciding upon the offer of composition, no creditor whose debt is below 20*l.* shall be reckoned in number, but the debt due to such creditor shall be computed in value; and every creditor to the amount of 50*l.* and upwards residing out of England, shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for a creditor's voting in the choice of assignees; and, if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the court that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent."

\*FOSTER v. CRABB. *June 8.*

[\*379]

In detinue for a deed in which the plaintiff was interested as cestui que trust,—the defendant pleaded, that A. and B., the trustees, took and had a property and a right and title to the deed, and to the possession thereof; that, after the making of the deed, and before the plaintiff had obtained or had possession of the same, &c., A. obtained and had possession of it; that, whilst A. was possessed of the deed, he delivered it to the defendant, to be by him kept, and to be redelivered by him to A. on request; and that the defendant detained and detains the deed from the plaintiff, for and on behalf of A., by the authority, license, and request of A.

To this plea the plaintiff replied, that, before the defendant was possessed of the deed, one G., and not the said B., was possessed thereof, and, being so possessed thereof, G. delivered the deed to the defendant, at the request and by the authority of the plaintiff, and the defendant, at the request, and by the authority, and on behalf of the plaintiff, then received the deed of and from G., and had always held and still holds the same under and by virtue of such last-mentioned request and authority,—*without this that the said A. delivered the deed to the defendant, as alleged in the plea:—*

Held, that the replication was sufficient both in the inducement and in the traverse; for, that, without the allegation thereby traversed, the plea would be no answer to the declaration.

DETINUE, for “a certain deed, to wit, an indenture, bearing date, to wit, the 26th of September, 1842, and made between one George Ball of the first part, the plaintiff of the second part, and one David Colombine and one Edward Bridges Swindall of the third part, which indenture purports to be a grant of a certain annuity of 100*l.* from the said George Ball to the plaintiff, for the life of the said George Ball.”

Plea,—that, by the said deed,—after reciting, amongst other things, that the plaintiff had contracted and agreed with the said George Ball for the purchase of an annuity of 100*l.* for and during the life of the said George Ball, for the sum of 650*l.*, to be subject to re-purchase upon the terms thereafter mentioned; that, upon the treaty for the said purchase, it was agreed that the said annuity should be secured by a conveyance of the hereditaments and premises thereafter described, and an assignment of the policy thereafter recited, upon the trusts and with the powers thereafter expressed and contained of and concerning the same respectively; and that the said annuity should be further secured by the covenants thereafter contained, and by the warrants \*of attorney thereafter respectively recited,—it was [\*380 by the said deed witnessed, that, in consideration of the sum of 650*l.* sterling to the said George Ball paid by the plaintiff at or before the execution of those presents, he the said George Ball did grant, bargain, and sell unto the plaintiff, his executors, administrators, and assigns, one annuity of 100*l.* sterling, to be paid and payable for and during the life of him the said George Ball, and to be charged and chargeable upon the hereditaments and premises and policy thereafter respectively released and assigned,—to have and take the said annuity unto the plaintiff, his executors, administrators, and assigns, for and during the life of the said George Ball, to be paid and payable as therein mentioned: and it was by the said deed further witnessed, that, in consideration of the said sum of 650*l.* so paid to the said George Ball



by the plaintiff as thereinbefore was mentioned, and in consideration of the sum of 10s. to the said George Ball paid by the plaintiff, as thereinbefore was mentioned, and in consideration of the sum of 10s. to the said George Ball paid by the said David Colombine and Edward Bridges Swindall, at or before the execution of the said indenture, the receipt whereof was thereby acknowledged, he, the said George Ball, had granted, bargained, sold, and released, and by the said deed (which, in respect of such hereditaments and premises secondly thereafter described as were of freehold tenure, and for the purpose of barring the estate-tail in remainder of the said George Ball therein, was intended to be enrolled in her Majesty's high court of Chancery in Ireland, in pursuance of the act (a) for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland), did grant, bargain, sell, and \*381] release unto the said David Colombine and Edward Bridges Swindall, such parts thereof as are of freehold tenure being in their actual possession by virtue of a bargain and sale to them thereof made by the said George Ball, in consideration of 5s., by indenture bearing date the day next before the day of the date of the said deed, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession, their heirs, executors, and administrators, certain messuages, dwelling-houses, cottages, out-houses, buildings, farms, lands, tenements, hereditaments, and premises therein mentioned, and which the said George Ball had an estate, property, right, and title to, as therein mentioned; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the aforesaid messuages, farms, lands, and other hereditaments; and all the estate, right, title, interest, use, trust, property, profit, claim, and demand whatsoever of the said George Ball, in, to, and upon the same hereditaments and premises,—To have and to hold the hereditaments and premises first thereinbefore described, and intended to be thereby released and conveyed, but subject to the life-estate of the said George Ball, the father of the said George Ball, therein, and, as to the lands in Priorstown and Killarty, with the appurtenances to the said annuity of 150*l.* by the therein-recited indenture of the 23d of February, 1821, secured to the said Sarah Ball, and subject to the said sum of 4500*l.* by the therein-recited indenture of the 15th of March, 1821, secured for the benefit of Mary Jane Ball, Elizabeth Ball, and Louisa Ball, and to the therein-mentioned term of five hundred years for securing the same, and to the sum of 2000*l.* by the same indenture secured for the benefit of the other children of the said \*382] George \*Ball, the father, and Sarah his wife, in case there should be any such other children, unto and to the use of the said David Colombine and Edward Bridges Swindall, their heirs and assigns, during

the life of him the said George Ball, party thereto, without impeachment of waste; and to have and to hold such of the hereditaments and premises secondly thereinbefore described, and intended to be thereby released and conveyed, as were of freehold tenure, subject to the life-interest of the said George Ball the father therein, unto and to the use of the said David Colombine and Edward Bridges Swindall, their heirs and assigns, for all such estate and interest as the said George Ball, party thereto, could by the said deed lawfully create therein, and absolutely freed and for ever discharged from the estate-tail of the said George Ball, party thereto, under the said recited indenture of the 15th of March, 1821, or otherwise; and to have and to hold such of the hereditaments and premises secondly thereinbefore described, and intended to be thereby assigned and conveyed, as are of freehold tenure, but subject to the said life-interest of the said George Ball the father therein, unto the said David Colombine and Edward Bridges Swindall, their executors, administrators, and assigns, for all the term or terms of years now to come and unexpired therein; but, nevertheless, as to the hereditaments thereinbefore described, and intended to be thereby released, assigned, and conveyed, upon and for the trusts, intents, and purposes, and with and subject to the powers and provisions herein-after expressed and declared of and concerning the same, that is to say, upon trust, that, if the said annuity of 100*l.*, or any part thereof, should at any time or times thereafter be in arrear for the space of three months next after any of the days or times thereinbefore appointed for payment of the same, or if the premiums and other sums of money thereafter covenanted to be paid, or any of them, should at any time or times thereafter be in arrear for the space of three months next after any of the days or times after which [383 the same should have become due and payable by the said George Ball, party thereto, then and in any of such cases, and so often as the same should happen, they the said David Colombine and Edward Bridges Swindall, or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, should, by and out of the rents, issues, and profits of the said hereditaments and premises thereinbefore described, and intended to be thereby conveyed, or any part thereof, or by bringing actions against the tenants or occupiers of the same hereditaments and premises respectively for the recovery of the rents, issues, and profits thereof, or by such other ways and means as to them or him should seem meet, levy and raise such sum or sums of money as should be sufficient, or as they or he should think expedient, for paying and satisfying to the plaintiff, his executors, administrators, or assigns, the said annuity of 100*l.*, and also the said premiums and other moneys thereafter covenanted to be paid, or such part thereof respectively as should be in arrear and unpaid, and all costs, charges, and expenses whatsoever which the plaintiff, his executors, administra-

tors, or assigns, or the said David Colombine and Edward Bridges Swindall, or either of them, their or either of their heirs, executors, administrators, or assigns, or the said David Colombine and Edward Bridges Swindall, had paid or been put unto by reason of the non-payment thereof respectively, or otherwise in the execution of the trusts thereby created, and should pay and apply the moneys so to be levied and raised, or a competent part thereof, in or towards payment or satisfaction of the said arrears, premiums, and other moneys, costs, charges, and expenses, accordingly, and pay the surplus, if any, unto the said \*384] George Ball, party thereto, his heirs, executors, \*administrators, or assigns, for his and their own use and benefit; and, subject to the trusts aforesaid, should permit and suffer the said George Ball party thereto, his heirs, executors, administrators, and assigns, to receive and take the rents, issues, and profits of the same hereditaments and premises for his and their own use and benefit: and by the said deed it was further witnessed, that, for the considerations aforesaid, he the said George Ball, party thereto, did thereby bargain, sell, and assign unto the said David Colombine and Edward Bridges Swindall, their executors, administrators, and assigns, a certain policy of assurance therein mentioned, and the sum of 200*l.* thereby assured, and all other moneys to be had or obtained under or by virtue of the said policy, together with full power and authority to ask, demand, sue for, recover, receive, and give effectual releases and discharges for, the said sum of 200*l.*, and all other moneys to be had or obtained under or by virtue of the said policy,—To have, hold, receive, and take the said policy and sum of 200*l.*, and all other moneys thereby assigned, or intended so to be, unto the said David Colombine and Edward Bridges Swindall, their executors, administrators, and assigns, upon and for the trusts, intents, and purposes, and with and subject to the powers and provisos thereafter expressed and declared of and concerning the same: Averment, that, under and by virtue of the said deed, and the premises aforesaid, the said Edward Bridges Swindall and the said David Colombine took and had a property and a right and title to the said deed, and to the possession of the same; that, after the making of the said deed, and before the plaintiff had obtained or had possession of the same, and before the said detention in the declaration mentioned, and before the commencement of this suit, to wit, on the 26th of December, 1842, the said Edward Bridges Swindall obtained and had possession \*385] of the \*said deed; that the said David Colombine afterwards, to wit, on the 22d of July, 1845, died; that the said George Ball, the father of the said George Ball the party to the said deed, afterwards, to wit, on the day and year last aforesaid, also died: that afterwards, and before the commencement of this suit, and before the said detention by the defendant of the said deed, and whilst the said Edward Bridges Swindall was possessed of the said deed, to wit, on the 1st of

January, 1852, the said Edward Bridges Swindall delivered the said deed to the defendant, to be by him kept, and to be re-delivered by him to the said Edward Bridges Swindall on request : that he detained and detains the said deed from the plaintiff for and on behalf of the said Edward Bridges Swindall, by the authority, license, and request of the said Edward Bridges Swindall to him the defendant for that purpose first given, granted, and made : and that the plaintiff's property in, and right and title to, the said deed, was and is derived and acquired from and by reason of his being a party to the same, and not otherwise,—verification.

Replication,—that, before the defendant was possessed of the said deed in the said plea mentioned, and after the death of the said David Colombine, one George Green, and not the said Edward Bridges Swindall, was possessed of the said deed, and, being so possessed thereof, the said George Green delivered the same to the defendant, at the request and by the authority of the plaintiff; and that the defendant, at the request, and by the authority, and on behalf of the plaintiff, then received the said deed of and from the said George Green, and had always held, and still held the same under and by virtue of such last-mentioned request and authority,—without this that the said Edward Bridges Swindall delivered the said deed to the defendant, in manner and form as in the plea alleged,—concluding to the country.

\*Special demurrer, assigning for causes, amongst others,—that the special traverse taken in the replication was an immaterial traverse;—that, if such traverse were found for the plaintiff, the remainder of the plea would of itself be an answer to the action;—that, if the defendant detained the deed on behalf of the said Edward Bridges Swindall, by his authority, license, and request, the action was not maintainable, though he might not have delivered the deed to the defendant;—that the inducement to the traverse was bad, and inconsistent with the declaration, inasmuch as if the defendant always held and still holds the said deed under and by virtue of the said request and authority of the plaintiff, the plaintiff had no ground to maintain the action;—that the replication was double, in alleging and setting up a bailment of the deed on behalf of the plaintiff to the defendant, and a receipt and detention of such deed, under such bailment, and also a denial of the bailment by Edward Bridges Swindall to the defendant;—that, if the plaintiff meant to rely on the alleged bailment by the said George Green to the defendant, at the request and by the authority of the plaintiff, as an answer to the plea, he ought not to have concluded his replication with a traverse;—that the replication ought to have concluded with a verification, and not to the country;—that the replication ought to have answered both the alleged bailment by Edward Bridges Swindall to the defendant, and also the alleged detention of the deed on behalf and by the authority of the said Edward Bridges Swindall;—that the replication was uncertain, am- [\*386]

biguous, and perplexing, and it could not be gathered therefrom whether the plaintiff relied on the supposed bailment by his authority to the defendant, as precluding the defendant from setting up the title and authority of Edward Bridges Swindall, or on the mere denial of the alleged \*387] bailment by Swindall to the defendant;—that, \*if the replication relied upon the defendant's being precluded from setting up the title of Swindall, it should have been pleaded by way of estoppel.

The plaintiff joined in demurrer.

*J. Brown*, in support of the demurrer.—The replication does not answer the whole plea; for, the plea not only alleges a bailment of the deed by Swindall, but goes on to aver that the defendant detains it for and on behalf, and by the authority, license, and request of Swindall. Both allegations were necessary to constitute a defence. The only material part of the replication is that which follows the *absque hoc*; but it does not go far enough. A demurrer is not a confession, if the count, plea, or replication be vicious: *Com. Dig. Pleader* (Q. 6), citing *Holford and Platt's Case*, 2 Roll. 22, *Zouch and Bamfield's Case*, 1 Leon. 80. So, a thing not material or traversable, is not confessed or admitted by the demurrer, where it is not traversed: *Rex v. The Bishop of Chester*, 2 Salk. 560, 561. [MAULE, J.—That means, that it cannot be used as an admission upon any other occasion.] If the plaintiff had intended to rely upon the matter alleged in the former part of his replication, he should have replied it by way of estoppel. In *Sanderson v. Collman*, 4 M. & G. 209 (*E. C. L. R.* vol. 43), 4 Scott, N. R. 638, where it was for the first time held that matter of estoppel in pais may be pleaded, *Tindal, C. J.*, says: “Estoppel may be by matter of record, by deed, and by matter in pais: *Co. Litt.* 352 a. If, by the last branch, it is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. No very precise instances are given in the books where matter of this sort has been pleaded. But it is to be remembered, that, under the old \*388] system of pleading, almost every defence might have been \*given under the general issue; and the plaintiff therefore could not have known that a defence would be attempted to be set up which the defendant was estopped from making. Lord Coke, in *Co. Litt.* 352 a, speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence: but, looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury.” So, in *Freeman v. Cooke*, 2 Exch. 654,† where this matter was very much discussed, *Parke, B.*, says, “It is certain that estoppels by record and by deed must, in order to make them binding, be pleaded, *if there be an opportunity*, otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large, on which

the jury may find according to the truth: *Treviban v. Lawrence*, 2 *Ld. Raym.* 1036, 1048, 1 *Salk.* 277; *Magrath v. Hardy*, 4 *N. C.* 782, 6 *Scott*, 627. With respect to estoppels in pais, in certain cases, there is no doubt they need not be pleaded, in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he had made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais, as the learned editor of *Williams's Saunders* (Vol. 1, p. 326, n. 2) expresses his opinion." All the authorities are clear, that, to give any effect to matter of estoppel, it must be pleaded by way of estoppel. The same doctrine is laid down by *Parke, B.*, in *The General Steam Navigation Company v. Guillou*, 11 *M. & W.* 877, 894.† And see 1 *Wms. Saund.* 325 a, n. (4). Here, the court cannot see from the record how the deed came into the \*hands of the defendant,—whether by delivery from the plaintiff, or by trover. If he obtained it by a trover or in any other way than by actual delivery from the plaintiff on a bailment to return it on request, he is justified in detaining it; *Swindall's* authority to him to hold it being sufficient as against *Swindall's* co-trustee. *Swindall* may clearly do by his agent what he might do himself. In *Com. Dig.*, *Attorney* (C. 1), it is laid down, that "a man may make an attorney for a special purpose; as, to make or take livery:" *Co. Litt.* 52; 2 *Roll.* 8, l. 25: "And, in all cases where a man has a power, as owner, or in his own right, to do a thing, he may do it by attorney; as, *cestui que trust*, after the statute 1 *R.* 3, c. 1, and before 27 *H.* 8, c. 10, might dispose of his land by attorney:" *Combes's Case*, 9 *Co. Rep.* 75 b. [*JERVIS, C. J.*—You say that the inducement to the special traverse may be altogether disregarded: if so, what is the use of it?] In *Stephen on Pleading*, 5th edit. p. 204, it is said that "the general design of a special traverse, as distinguished from a common one, is, to *explain or qualify the denial*, instead of putting it in the direct and absolute form:" and this the learned author illustrates at great length. The special traverse must be sufficient of itself. [*JERVIS, C. J.*—No doubt.] Suppose the plaintiff joined issue upon this traverse, and the jury found that *Swindall* did not deliver the deed to the defendant, in manner and form as alleged, and there was a motion in arrest of judgment,—would not the plea be held good without the allegation which this replication traverses? *MAULE, J.*—Independently of the question of form, you must contend, that, where there are two tenants in common of a deed, and a third person holds it against one who complains, and the defendant pleads that he holds it by the authority of the other co-tenant, without showing how he got it, it would be

\*390] no answer for the plaintiff to reply, that the defendant got \*it from him, to hold for him, and to be re-delivered on request.] If the plaintiff delivered a deed to the defendant in which the former claimed the sole property, the latter could not, when it was re-demanded of him, set up the *jus tertii*. But that is not quite this case: the defendant does not deny the property of the plaintiff, but claims to hold the deed under the authority of one having equal title with the plaintiff. It has been doubted whether *detinue* is properly an action of contract or tort. In *Chitty on Pleading*, Vol. 1, p. 135 (7th edit.), it is said: "This is an action somewhat peculiar in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu*, or should be ranked with actions *ex delicto*. The right to join *detinue* with debt, and to sue in *detinue* for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action *ex contractu* than an action of tort. On the other hand, it seems that *detinue* lies although the defendant wrongfully became the possessor thereof in the first instance, without relation to any contract. And it has recently been considered as an action for tort, the gist of the action not being the breach of a contract, but the *wrongful detainer*; for which reason, although a declaration in *detinue* has stated a bailment to the defendant, and his engagement to *re-deliver on request*, and the defendant has pleaded that the bailment was a security for a loan, the plaintiff may, without being guilty of a departure, reply that he tendered the debt, and that the defendant afterwards wrongfully withheld the goods:" *Gledstane v. Hewitt*, 1 C. & J. 565,† 1 Tyrwh. 445. And the editor adds in a note,—“So, the action of *detinue* is so far considered an action of tort, that, if one joint-tenant bring the action, the objection of nonjoinder of the others can only be taken by plea in abatement: Broadbent v. Ledward, \*11 Ad. & E. 209 (E. C. L. R. vol. 39), \*391] 3 P. & D. 45.” In *Hand v. Daniels*, 1 L. M. & P. 420, Maule, J., says: “If *detinue* be an action of tort, how do you account for that which is perfectly well known, viz., that counts in debt and *detinue* may be joined, which would be preposterous if the one were contract the other tort. On the other hand, there is no difficulty in treating *detinue* as an action of contract. The difficulty alluded to by Mr. Chitty,—‘that *detinue* lies, although the defendant wrongfully became the possessor’ of the chattel, ‘in the first instance, without relation to any contract,’—may be explained by considering the plaintiff as waiving the tort, and treating the defendant in the more favourable situation of a person who rightly became possessed of the chattel in the first instance, and as complaining only of the wrongful detention.” [MAULE, J.—*Detinue* is so very like contract, that it differs from it in one particular only. Debt may be brought for a horse, a robe, or a fish,—not a specific horse, robe, or fish. And one can conceive why

debt and detinue should be brought for fish,—debt for fish generally, and detinue for particular fish caught for the plaintiff.(a)] The inducement, it is submitted, is insufficient in itself: the bailment in detinue is not traversable,—*Clossman v. White*, 7 C. B. 43 (E. C. L. R. vol. 62): the only traverses now pleaded in detinue, are, non detinet, and a denial of the plaintiff's property. Here, the replication does not state that the defendant held the deed, to be re-delivered on request. [MAULE, J.—It states that Green delivered the deed to the defendant at the request and by the authority of the plaintiff, and that the defendant, at the request and by the authority, and on behalf of, the plaintiff, then received the deed of and from Green, and that the defendant held, and still holds the same under and by virtue of \*such last-mentioned request and authority.] That is a mere argumentative [\*392 traverse of the detention with Swindall's authority.

*John Gray*, contra.—The real question is, whether it is material from whom the defendant obtained the deed. It is submitted that it is, and therefore that the traverse is a material one. The introductory matter must be looked at with reference to that to which it is pleaded. The plea contains three distinct allegations which go to make up the defence,—first, that Swindall had possession of the deed,—secondly, that, being so possessed of the deed, Swindall delivered it to the defendant, to be by him kept, and to be re-delivered to Swindall, on request,—thirdly, that the defendant holds the deed under the title so derived from Swindall. That, it is submitted, is a good plea: but, strike out the second allegation, and the plea is no answer to the action. Suppose Swindall lost the deed, and the plaintiff picked it up, and delivered it to the defendant, to be re-delivered to him on request,—can any one say, that, if the defendant refused to re-deliver it on request, the plaintiff would not have a good right of action against him? And, is not that state of things consistent with this plea, the second allegation being struck out? That allegation, therefore, was a material one to traverse. [JERVIS, C. J.—Are you not, on special demurrer, bound to have both the inducement and the special traverse good?] I find no authority for that. If the traverse is material, you may pass by the introductory matter. If the introductory matter presents an answer, and the traverse is immaterial, the latter may be passed over. By the 18th of the Pleading Rules of Hilary Term, 4 W. 4, it is declared that "All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: Provided that this regulation shall not \*preclude the opposite party from pleading over to the inducement, when the traverse is immaterial." [JERVIS, C. J. [\*393 —That does not show that the opposite party may not insist upon its being made material, by special demurrer.] It is a step in the argument. In *The Cross Keys Bridge Company v. Rawlings*, 8 N. C. 71,

(a) See *The Earl of Falmouth v. Penrose*, 6 B. & C. 386 (E. C. L. R. vol. 13), 9 D. & R. 452.



3 Scott, 400, to a declaration for carelessly impinging with a ship against the plaintiffs' bridge, and thereby doing damage, the defendants pleaded, that the plaintiffs improperly narrowed the channel by an obstruction,—without this that the damage was occasioned by the carelessness of the defendants: and it was held that the defendants, having failed to prove the introductory matter, were still entitled to go into evidence in disproof of the alleged carelessness. [JERVIS, C. J.—When you choose to go to issue on the special traverse, you in effect strike out the inducement. MAULE, J.—The distinction is taken in the second instance put by Stephen, pp. 205, 206. It may be that the defendant wishes to give the plaintiff an opportunity to save the expense of a trial.] It is submitted that the introductory matter here is perfectly sufficient. This is a plea in confession and avoidance: it admits the title as alleged in the declaration. The object of the special traverse is, not to support the declaration, but to answer the plea. It was unnecessary in the inducement to state a perfect title, the declaration admitting it. It has been laid down somewhere that a special traverse needs not so much certainty as some other pleadings. Upon the whole, it is submitted that this replication is a sufficient answer to the plea.

*Brown*, in reply.—In Stephen on Pleading, p. 212, it is distinctly laid down “that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading; for, it is the use \*394] and object \*of the inducement to give an explained or qualified denial, that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had previously been made in an indirect one. Now, an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the *absque hoc*, an answer in substance to the last pleading.” In Com. Dig. *Pleader*, (G. 20), it is said: “The inducement ought to be sufficient in substance: and, therefore, in prohibition, upon a suggestion of a discharge of tithes, if the defendant pleads an agreement between the master of the hospital of B. and the abbot, that the lands shall be discharged only in the hands of the abbot, and traverses the discharge, the inducement is bad; for, it does not show any title in the master of the hospital to the tithes, or how he could make such agreement: *Johnson v. Sir Henry Rowe*, Cro. Car. 265. So, if the defendant, in his inducement to the traverse, shows a defective title, the inducement is bad: *Dike v. Ricks*, Cro. Car. 336. As, if, in bar to an avowry for rent, by the assignee of a reversion, the plaintiff shows a devise for sale, if the goods are not sufficient for the payment of debts, and a sale to him before the assignment, and traverses the descent to the assignor, it is not good, if he does not show the condition precedent well performed, viz. what debts

and what goods there were, whereby the court may judge that they were not sufficient: *Dike v. Ricks*, Sir W. Jones, 328." In *Smith v. Lovell*, 10 C. B. 6 (E. C. L. R. vol. 70), the demurrer was allowed, on the ground that the inducement was inconsistent with the traverse. Tindal, C. J., in *The Cross Keys Bridge Company v. Rawlings*, says,— "The new rules in pleading have effected no alteration in the law with regard to the traverse, except that now, by the \*rule of Hilary Term, 4 W. 4, s. 13, all special traverses, or traverses with an [\*395 inducement of affirmative matter, are required to conclude to the country. Suppose this action had been brought before the new rules, and the plaintiffs had, in their declaration, charged the defendants with injuring their bridge through carelessness and negligence,—the defendants would have pleaded that the plaintiffs by their own wrongful act narrowed the waterway; with an *absque hoc* denying the imputed carelessness and negligence, and concluding with a verification: and the proper issue on that would have gone to the carelessness and negligence. The rule always was, with respect to a special traverse, that the opposite party has no right to pass by the traverse, and take issue on the inducement, unless the traverse be immaterial or bad." The true test is, to see if the special traverse would be good, without any inducement at all. The plea being good, the plaintiff must show that the replication affords an answer to it, in any state of circumstances that can be suggested on the face of the plea. [MAULE, J.—Of course you contend that the plea would be an answer to the declaration, without the allegation of delivery by Swindall to the defendant?] I do.

JERVIS, C. J.—I am of opinion that the plaintiff is entitled to the judgment of the court upon this demurrer. I have always understood the object of the special traverse to be as is stated in *Stephen on Pleading*. The plaintiff may either join issue on the facts stated in the plea, and go to the country; or he may state circumstances in his replication inconsistent with the matter alleged in the plea, concluding with a special traverse, and so give the defendant an opportunity of raising a question for the court: but it must be so pleaded that the defendant may either traverse the facts alleged, or demur. The plaintiff has taken that course here: and \*the defendant might have taken [\*396 issue upon the inducement, or he might have traversed it, if the denial under the *absque hoc* was insufficient in point of law. He has chosen to demur. As to the traverse,—the real test is, to strike out of the plea the allegation that is traversed, and see whether the plea would then be a sufficient answer to the declaration. It seems to me, that, tried by that test, the traverse is material, and the plea bad. The plea is in confession and avoidance; so that, if the title set up in the plea is not supported, it admits that the plaintiff had title to the deed. The defendant seeks to dispute the plaintiff's title, by saying,—Swindall had possession of the deed, and delivered it to me. No, says

the plaintiff, Swindall did not deliver the deed to you, as you allege. Consistently with one fair view of the plea, that is a sufficient answer to it; for, if Swindall did not deliver the deed to the defendant, the defendant has no right to say that he detains it by the authority and permission of Swindall, who has ceased to have the possession of it. Without, therefore, the allegation in the plea which is traversed by the replication, the plea would be no sufficient answer to the declaration; consequently, the traverse is a material one, and there must be judgment for the plaintiff. Then, as to the inducement, two points are made: first, it is said that there is no allegation in the inducement that the deed was delivered by Green to the defendant, to be re-delivered by him to the plaintiff on request. That, however, is not pointed out as a ground of demurrer; and it was sufficient for the plaintiff to deny the matter of the plea. The other point is rather more material: it is said that the plea shows that the defendant detained and still detains the deed by the authority and on behalf of Swindall. The replication states, that, before the defendant was possessed of the deed, as in the plea mentioned, one Green was possessed thereof, and, being so possessed thereof, Green delivered the same to \*the defendant at \*397] the request and by the authority of the plaintiff, and the defendant, at the request, and by the authority, and on behalf of the plaintiff, then received the deed of and from Green, and has always held and still holds the same under and by virtue of such last-mentioned request and authority,—absque hoc that Swindall delivered the deed to the defendant, as alleged in the plea: not that the authority still continues, but that the defendant holds the deed without any other authority than that derived from the plaintiff. It seems to me that that is an answer to the objection pointed out, and that the inducement is consistent with the traverse, and consequently that the plaintiff is entitled to judgment.

MAULE, J.—I am entirely of the same opinion: and I do not think I can profitably add anything to the reasons given by the Lord Chief Justice.

The rest of the court concurring,

Judgment for the plaintiff.

\*398]

\*COZENS v. GRAHAM. June 11.

A., an attorney in London, enclosed a writ of summons, and subsequently a notice of declaration and particulars, to B., an attorney in the country, for service. B., by letter, apprised A. of the service, annexing the account of his charges. The name of the cause was mentioned in the letters, but not the court in which the business was done:—Held, that the bill gave A. sufficient information, and that the statute 6 & 7 Vict. c. 73, s. 37, was complied with.

THIS was an action of debt, for work and labour, and for money found due upon an account stated.

The defendant pleaded, amongst other pleas, that the action was

brought to recover fees, charges, &c., as an attorney, and that no signed bill was delivered, pursuant to the statute 6 & 7 Vict. c. 73, s. 37.

Replication,—as to 1*l.* 0*s.* 6*d.*, parcel, &c.,—that the plaintiff did, within one calendar month before action brought, send by post to the defendant, at his office of business, a bill, accompanied by a letter subscribed by the plaintiff, and referring to the said bill.

There were similar replications as to 9*s.* 7*d.* and 13*s.* 7*d.* respectively.

The defendant took issue upon these replications.

The cause was tried before the under-sheriff of Middlesex, on the 27th of May last. The facts were as follows: The plaintiff was an attorney residing and practising at Haverfordwest, in the county of Pembroke; the defendant was a London attorney. The action was brought to recover the amount of three several bills of costs for business done by the plaintiff as agent for the defendant. To prove the plaintiff's case, the following correspondence was given in evidence:—

“London, December 3d, 1851.

“Poole *v.* Barker.

“Sir,—Enclosed I beg to send you writ of summons, which I will thank you to have served on the defendant (a Captain Barker), with as little delay as possible, and inform me when done, with an account of your charges. I must also trouble you, before serving the writ, to \*ascertain the defendant's Christian names for me, and insert [\*399 them, and to let me know them, that I may amend the præcipe.

“W. Cozens, Esq.”

“J. GRAHAM.”

“Haverfordwest, Dec. 6, 1851.

“Poole *v.* Barker.

“Dear Sir,—Pursuant to instructions, I beg to inform you that defendant was this day duly served with copy writ of summons. The name ‘Thomas’ appears to be the correct one, as his second baptismal name. My charges are below, which please remit by post-office order.

“W. COZZENS.”

“Attending at several places, making inquiries as to defend-

ant's Christian name, and altering writ . . . . .	0	8	4
“Letter to you thereon, and postage . . . . .	0	3	7
“Copy and service,—five miles . . . . .	0	10	0
“Letter to you, and postage . . . . .	0	3	7

“£1 0 6”

“J. Graham, Esq.”

“London, December 11, 1851.

“Poole *v.* Barker.

“Dear Sir,—Be pleased to send me an affidavit of the service of this writ, with an account of your further charges, which, with those already received, shall be remitted to you in the way you direct.

“W. Cozens, Esq.”

“J. GRAHAM.”



*Quain*, on a former day on this term, obtained a rule nisi for a new trial. [JERVIS, C. J., referred to *Sargent v. Gannon*, 7 C. B. 742 (E. C. L. R. vol. 62).]

*Hawkins* now showed cause.—The bills in question clearly do not satisfy the statute: none of them contain the name of the court in which the business is alleged to have been done; and the circumstance of the defendant's being an attorney will not warrant the court in putting a different construction upon the statute from that which they would put upon it in the case of a layman. [MAULE, J.—In *Martindale v. Falkner*, 2 C. B. 706 (E. C. L. R. vol. 52), it was held, that, to be a compliance with the statute, the bill should mention both the court and the cause in which the business has been transacted. The majority of the court there thought that the court was by necessary implication pointed out. But the difficulty is this,—is it not by *express enactment* that the mention of the court is required. The object is, that the client may know where he is to apply to get the bill taxed. Here, the defendant, an attorney, sends down the writ to the plaintiff for service; and now he says,—“Oh! your bill does not give me the information I am entitled to: it does not tell me in which court the business was done.” The strict *letter* of the *statute* has certainly \*been complied with. The practice of the court, however, requires something more, to [\*402 satisfy the spirit of the rule. Can you refer us to a case where the party to whom the bill is sent has as much knowledge on the subject as the persons sending it?] Every defendant who is served with a writ, knows the court in which the business is done, as well as the attorney who issues it. *Dimes v. Wright*, 8 C. B. 831 (E. C. L. R. vol. 65), shows how strict the rule is held: it was expressly decided there, that an attorney's bill is not a compliance with the statute, unless it furnish reasonable information as to the court and the cause in which each item charged for has been transacted. [MAULE, J.—There, it was doubtful, on the face of the bill, where the business had been done. JERVIS, C. J.—The taxation may now take place in any of the common law courts, if any part of the business comprised in the bill has been transacted in a court of common law.] In *Ivimey v. Marks*, 16 M. & W. 843,† it was also held, that the attorney is bound to specify in his bill, as well every court as the name of every suit in which the business charged for is done; and that such bill is an entire thing, and, if the same bill blends charges for work done in a court of equity, with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge, or be advised, where he should refer the whole bill for taxation. And in *Engleheart v. Moore*, 15 M. & W. 548,† Alderson, B., says: “This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client, and strictly for the attorney; for, the latter knows the law, and the former does not. With the view to the taxation and payment of the

bill, if the client desires it, the legislature intended that the client should be informed where each item of business was done, and that the attorney should hold his hand for a month after the delivery of \*403] the bill for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose, it is very material that the bill should show in what court the business was done, because the fees are different in different courts; and, how can an attorney advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid? Without such information, he could not know whether, upon taxation, a sixth of the bill would be struck off or not." The same point was conceded in *Sargent v. Gannon*, 7 C. B. 742 (E. C. L. R. vol. 62).

*Quain*, in support of the rule.—The statute 6 & 7 Vict. c. 73, s. 37, does not, as has already been observed, in terms require the court to be mentioned: but it has been decided that the bill must give that information. Here, the name of the *cause* is in each instance stated at the head of the letter under which the items of charge are written: and the correspondence shows with sufficient distinctness that the business was done in a court of common law. The writ and the notice of declaration which were enclosed by the defendant to the plaintiff in the letters dated respectively the 3d of December, 1851, and the 13th of January, 1852, must necessarily have shown the particular court. The case of *Sargent v. Gannon* is quite conclusive. There, the bill of costs was headed, "*Yourself v. Round*" (the client's name being Gannon), and endorsed "*Hancocks v. Round*," was enclosed in a signed letter addressed to Gannon, beginning "*Hancocks v. Round*,—I send you my bill in this matter:" all the business comprised in the bill had reference to a purchase of land under a decree of the Court of Chancery in a cause of "*Hancock v. Round*:" and it was held that the *name of the cause* sufficiently appeared. The bill was not headed in any *court*: but \*404] the whole \*related to one transaction, and some of the items were for attendances at the accountant-general's and at the master's offices, and in court upon a petition to the Vice-Chancellor: and it was held, that the bill gave reasonable information to the client as to the course to be pursued in order to tax the bill, and therefore the statute was complied with. "It appears," says Coltman, J., "to be established by the cases, that there are two requisites to make an attorney's bill of costs a compliance with the statute, viz. that it should contain the name of the cause, and also that of the court in which the business charged for has been transacted. At the same time, it appears to me, that in ascertaining whether or not these two essentials concur, we are bound to apply every reasonable and fair intendment to the language of the bill; for, though I agree that the act ought to be so construed as to give the client the benefit intended, yet we are not to

shut our eyes to the attorney's claim to have equal justice meted out to him also." And Williams, J., adds: "The only question is, whether any person not a lawyer could be misled by this bill, or induced to doubt that the whole was for business done in the Court of Chancery. I think it is impossible that he could be."

JERVIS, C. J.—I am of opinion that this rule must be made absolute. The statute is complied with in terms, and, as I think, in its spirit also. The bills are enclosed in letters which sufficiently indicate the court in which the business is done, inasmuch as they refer to the service of the particular thing transmitted by the defendant to the attorney for service. In holding that this is a sufficient compliance with the statute, we shall not be violating the strictest authority upon the subject.

MAULE, J.—I am of the same opinion. This is not, \*like [405 some of the cases where attorneys' bills have been the subject of discussion with reference to this statute, a case where the bill consists of a series of charges of such a character that the client may well enough be supposed not to know where the business charged for has been done: it is but one transaction of a business by the plaintiff for the defendant with reference to one particular suit. The whole appears upon the correspondence. It begins with a letter from the defendant to the plaintiff, enclosing a writ of summons for service: this is answered by an intimation that the writ has been served, and that the charges are so and so. Then, the defendant requests the plaintiff to send him an affidavit of service, together with his further charges. That request having been complied with, there comes another letter from the defendant, enclosing the notice of declaration, and particulars of demand, with instructions for service thereof; the charge for which, and for the letter intimating that it has been done, form the last items of the plaintiff's bill. The charges are, in fact, for a series of things done in a particular court, in pursuance of orders received from the defendant, in letters which clearly point out the court in which the business was transacted. Each of the bills, in my opinion, constituted a sufficient signed bill to satisfy the statute. The question is, whether they are such as to give the party to be charged such fair information of those matters which the statute and the practice of the court require as he is reasonably entitled to. A strict and literal compliance with the statute has been held not to be enough, where the information necessary to enable the client to know where he is to apply to obtain a taxation of the bill, is wanting. Upon the whole, I think there can be no reasonable doubt that the delivery of the bills in question was a substantial, as well as a strict and literal, compliance with the statute.

\*CRESWELL, J.—I am entirely of the same opinion. The [406 plaintiff's letters which contained the charges, referring to the



instructions received from the defendant, gave ample information as to the court as well as the cause in which the business was done.

TALFOURD, J., concurred.

JERVIS, C. J.—The rule will be absolute to enter a verdict for the plaintiff for 2*l.* 3*s.* 8*d.*, but no costs of the day; that is, no costs that would not be paid as the condition of a new trial. The costs of the motion are not costs of the day, but costs in the cause.

Rule accordingly.

MARY FREEMAN v. TRANAH. *June 9.*

It is only where delay in signing judgment has arisen from the act of the court, that judgment can be entered *nunc pro tunc*, two terms having elapsed since the verdict.

A cause in which a verdict was entered for the plaintiff, was referred at the Spring Assizes, 1851: the arbitrator made his award, directing a verdict to be entered for the plaintiff, in Trinity Term following: the plaintiff died on the 22*d* of November: on the 3*d* of December, her will was taken to the proper office, to be proved, in order to enable her executrix to sign judgment; but, in consequence of a caveat having been entered by the defendant, probate was not obtained until the 6*th* of May, 1852. In Trinity Term, 1852, the executrix moved for leave to enter up judgment: as of Michaelmas Term, 1851:—Held, that, inasmuch as the delay was not attributable to any act of the court, the court had no authority to grant the application.

DEBT, for money lent, money had and received, money paid, and money found due upon an account stated. Pleas, never indebted, and the statute of limitations. Issue thereon.

The cause came on for trial at the last Spring Assizes for the county of Kent, when a verdict was taken for the plaintiff, subject to an award. The arbitrator made his award on the 28*th* of May, 1851, holding that the plaintiff was entitled to recover 32*l.* 1*s.* 6*d.* debt, and 1*s.*

\*407] \*damages, and directing a verdict accordingly: and he further directed the defendant to pay to the plaintiff, on demand, her costs of the reference, and that he should also bear and pay the costs of the award, and that, if the plaintiff should take up the award, and pay the costs thereof, the same should be repaid by the defendant to the plaintiff, on demand.

In consequence of the poverty of the plaintiff, she was unable to take up the award at the proper time; but, having in November last ascertained that the defendant had taken up the award, her attorney obtained a copy thereof on the 21*st* of that month. The plaintiff died on the 22*d* of November last. Her attorney, having obtained the *postea*, went on the 2*d* of December to the proper office for the purpose of signing judgment, but was informed by the clerk of the judgments, that, under the circumstances, judgment could not be signed without the leave of the court. On the following day, the plaintiff's will was taken to the proper office in Doctors' Commons for the purpose of proving the same, in order to put the executrix in a position to apply for

leave to sign judgment; when it was found that the defendant had entered a caveat against the probate being granted.

Probate was ultimately granted to the executrix, Mary Ann Freeman, the daughter-in-law of the deceased, on the 5th of May last.

Upon an affidavit of these facts,

*Phinn*, on a former day in this term, obtained a rule nisi to enter up judgment nunc pro tunc, as of Michaelmas Term last.

*Quain* now showed cause.—There is no pretence for making this rule absolute, either at common law, or under the statute of Charles. The rule is thus laid down in Archbold's Practice, 8th edit. p. 1015,—“By \*the common law, if any one of the parties died before final judgment, the suit abated. But, by statute 17 Car. 2, c. 8, s. [\*408 1, in all actions, personal, real, or mixed, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict. The court will in general permit a judgment to be entered nunc pro tunc, where the signing of it has been delayed by the act of the court. Therefore, if a party die after special verdict, or after a special case has been stated for the opinion of the court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the court are considering their judgment,—the court will allow judgment to be entered up after his death nunc pro tunc, in order that a party may not be prejudiced by a delay arising from an act of the court. But, if the judgment was not entered up, by reason of the laches of the plaintiff, or those representing him, or by reason of a proceeding in the common course of law, as, by a writ of error, or the like; or, if some prejudice would arise to the other party to which he could not otherwise be subject, the court will not allow the judgment to be so entered up. In fact, they will not grant such leave in any case, except where the party entitled to sign judgment has been prevented so doing, by reason of an unavoidable delay occasioned by an act of the court. Therefore, where a verdict was found, subject to a special case, to be agreed on between the parties, but it was not set down for argument until after the death of one of them, against whom judgment was ultimately given,—the court refused to allow judgment to be entered nunc pro tunc, at the instance of the successful party, as the delay in setting down the special case could not be considered as that of the court.” Here, the \*application is not made within two terms: the award was made [\*409 in Trinity Term, 1851, and this motion was not made until Trinity Term, 1852: the delay has not arisen from the act of the court, but from the laches of the party; for the court cannot allow want of means to take up the award to be an excuse. [JERVIS, C. J.—It was the defendant's act, in entering the caveat, which prevented the judgment being duly entered.] This court can only take notice of a

delay which has arisen from its own act. [MAULE, J., referred to *Lanman v. Lord Audley*, 2 M. & W. 535.†] *Evans v. Rees*, 12 Ad. & E. 167 (E. C. L. R. vol. 40), 4 P. & D. 36, at first sight, seems to be an authority in favour of this motion. There, the defendant obtained a verdict at the Spring Assizes, 1839, and died afterwards, and before Easter Term, 1839. In that term, the plaintiff moved for a new trial, and the court, having taken time to consider, refused the rule late on the last day of Easter Term. Judgment was signed for the defendant twelve days after the end of Trinity Term, 1839: costs were taxed; and the allocatur was obtained on the 12th of July, 1839, immediately upon which the entry of judgment was completed. The delay was accounted for partly by the length of time requisite for preparing the bill of costs, the cause being heavy, and partly by the taxation having been suspended by a summons (which was discharged) to set aside the judgment after it was signed. The defendant's administratrix sued out a scire facias for execution, returnable on the 20th of November, 1839, but was served on the 19th with notice of the allowance of a writ of error. On the 11th of January, 1840, she obtained a rule to enter judgment nunc pro tunc, as of Trinity Term, 1839; and the court made the rule absolute, considering that no laches was imputable to the defendant's administratrix, and that the delay was the act of the court (though it was not expressly sworn that the administratrix had \*notice of the motion for a new trial); and that the discretion  
 \*410] of the court was not limited by the statute 17 Car. 2, c. 8, s. 1. The judgment, however, explains the ground of the decision, viz. that the delay arose from the act of the court, and not from the laches of the party. [JERVIS, C. J.—Your client took up the award, and kept it.] It was not his duty to give the plaintiff notice, when he found the award was against him. [MAULE, J.—In *Evans v. Rees*, the whole delay in effect was the act of the court. They took time to consider what judgment should be given upon the motion for a new trial; and they further delayed while deliberating what the amount of the costs should be.] That is precisely the distinction between that case and the present.

*Phinn*, in support of his rule.—It would be a scandal and a reproach to the law, if the court were so fettered by technical rules as to be compelled to discharge this rule. What are the facts? A verdict is taken for the plaintiff at the Spring Assizes, subject to a reference. An award is made; but owing to her extreme poverty, the plaintiff is unable to take it up. In Michaelmas Term, it is for the first time brought to the knowledge of the plaintiff's attorney, that the award is in her favour. The plaintiff dies. The defendant enters a caveat, in order to put her representative to all the expense and inconvenience possible: and now he relies upon a technical rule of the court, to deprive the executrix of the fruits of the verdict. In *Evans v. Rees*, 12 Ad. & E. 167 (E. C. L. R. vol. 40), 4 P. & D. 36, the whole of the delay was not fairly attributable

to the act of the court: the defendant was unprepared for the taxation of costs. [JERVIS, C. J.—Have you any authority to show that misconduct or breach of faith of a party will warrant the court in deviating from the strict rule? In the case of *The Fishmongers' Company v. Robertson*, 3 C. B. 970, 974 (E. C. L. R. vol. 54), Wilde, \*C. J., says: [\*411 “Speaking from my own experience of some forty years, I must say I never knew a motion of this sort to be granted, unless where the delay had been the act of the court: and I am not aware of any instance in the books where that rule has been departed from. It may be that the court would grant relief in this way in a case of misconduct or breach of faith: but the present case does not stand upon any such ground.” That would rather seem to show that the power of the court is not so strictly limited as the cases suggest. Lord Truro had, as we all know, great experience in matters of this sort.] All technical rules must bend to do substantial justice between the parties. There is no value in any technical rule which does not tend to the administration of justice. [MAULE, J.—We are only intrusted to administer justice within certain limits. We cannot overstep our jurisdiction for the purpose of doing what is called substantial justice. The only instances in which the courts have done what we are now called upon to do, have been where the court itself has necessarily been incidental to the delay. We cannot have a higher authority for that than the learned person just mentioned, who has occupied with distinction every position in the profession, from that of attorney to that of Lord Chancellor. It is impossible to conceive how any man can be conversant with practice, if he was not.] “*Boni judicis est ampliare jurisdictionem*,” is a maxim that may well apply to this case. [MAULE, J.—“*Actus curiæ nemini gravabit*,” is more to the purpose. CRESSWELL, J.—It is laid down in 2 Wms. Saund. 72 p, upon the authority of *Copley v. Day*, 4 Taunt. 702, and *Lawrence v. Hodgson*, 1 Y. & J. 368,† that “judgment cannot, at common law, in any case, be entered nunc pro tunc, unless the delay be attributable to the act of the court.” *Lawrence v. Hodgson* is very much like the present case. There, at the Spring Assizes, 1826, a cause was referred, \*a verdict having been taken for the plaintiff, subject, as to the damages, to the award, and the arbi- [\*412 trator published his award, which, in the Michaelmas Term following, was set aside; after which, in Hilary Term, the plaintiff obtained a rule nisi to issue execution unless the defendants would consent again to refer the cause, which rule was discharged: the plaintiff having died in September, 1826, it was held that the court had no power to grant an application made in Easter Term, 1827, that judgment might be entered up as of the Michaelmas Term preceding. And Garrow, B., said: “I perfectly understand the principle upon which the courts have permitted parties to enter up judgment after the period in which they could legally have done so has elapsed, where the delay originates in

the court, and but for which delay the judgment might have been regularly entered. Where a case stands over for argument from term to term, on account of the multiplicity of business in the court; or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case. No such facts, however, exist in this particular instance, and the delay is imputable alone to the laches of the party interested in the judgment; the rule, therefore, which regulates the former cases, does not apply to this; and, as it is not within the operation of the statute, I am of opinion, on the authority of *Copley v. Day*, that the rule should be discharged." I find no case where the power of the court is expressly limited in the manner suggested. [MAULE, J.—You certainly do not cite any case where, upon such a state of facts as is presented here, the court has granted the application.] The defendant has wantonly and vexatiously entered a caveat. It is contrary to the policy of the law to permit a man thus to take advantage of his own wrong. [MAULE, \*413] J.—Entering a caveat was \*no wrong.] Vexatiously suing it out for the purpose of preventing the judgment being entered, was. [Quain.—The entering the caveat is altogether beside the case. It was not necessary to obtain probate, to enable the party to sign judgment.]

JERVIS, C. J.—I must confess that I have most unwillingly brought my mind to the conclusion that this rule should be discharged; because I think it is the duty of the court in all cases to the utmost of its power to do substantial justice. But I think the cases cited by Mr. Quain show that we have no authority to do that which is prayed here. By the death of the plaintiff between verdict and judgment, the suit abates, unless the judgment is entered up within two terms. The only instance in which the court will interfere to prevent the consequences which ordinarily attach to a neglect of this sort, is, where the delay has been occasioned by the act of the court itself. But the rule upon which they proceed,—“*Actus curiæ nemini gravabit*,”—is not applicable to the present case. I much regret the result: but I feel bound by the authorities; and, in deference to them, as well as to the opinions of my learned Brothers, I think this rule must be discharged.

MAULE, J.—I am of the same opinion. I agree, that, in this particular case, justice would be better administered by making the rule absolute, than by discharging it. But there is no court in England which is intrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times. And, although instances are constantly occurring where the courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent or by any technical rule, the law has

wisely considered it inconvenient to confer \*such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. The only court in this country which is not so fettered, is, the supreme court of the legislature. I think, that, if we were to allow judgment to be entered in this case *nunc pro tunc*, we should be doing it without any such ground as the court has acted upon in other cases. It is an established principle of law that the act of the court shall injure no one,—such as the court's taking time to deliberate on its judgment. That is the ground upon which all the cases are to be supported: there is no other definite or tangible ground. Whatever, therefore, may be the particular hardship or inconvenience in this case, I think we are bound by the decided cases, and the principles of law applicable thereto, to discharge this rule.

CRESSWELL, J.—I am entirely of the same opinion. We clearly have no authority to grant this application. The court has no jurisdiction to order a judgment to be entered as of any term, if the party is not by law entitled to it. It was a common expression of the late Chief Justice Tindal, that the course of the court is the practice of the court. We may assume it to be the course and practice of the court to allow judgment to be entered up *nunc pro tunc*: but that assumes that the party was in a condition at the time of which it is proposed that the judgment should be entered, to claim the decision of the court. I can very well understand \*the principle upon which a party is held entitled to be placed in the same position in which he was at the time he had a right to ask for judgment,—the delay being for the convenience of the court. The maxim "*Actus curiæ nemini gravabit*," is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law. If once we suffer ourselves to be induced by considerations of hardship in the particular case to deviate from that rule, we shall not know where to stop, being without any certain guide. No court is so arbitrary or so unsatisfactory as that which is unfettered by precedent and principle. I fear to take so large a step as that which this rule calls upon us to take, having no firm foundation to rest upon.

TALFOURD, J.—I am of the same opinion. There is neither principle nor precedent for this application: and, though I, in common with the rest of the Court, deplore the result, I think we ought not to be induced by our desire to do substantial justice in the individual case, to depart

from those general principles which are the only safe guides for the administration of the law.

*Quain* submitted, that, inasmuch as the application had been judicially pronounced to be without principle or precedent, the rule should be discharged with costs.

MAULE, J.—You shall have your costs of this motion if you will pay the money awarded; otherwise not.

Rule discharged, without costs.

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\*WINCH v. WILLIAMS. June 11.

A rule to show cause why a verdict for the defendant, or a nonsuit, should not be entered, in a cause which had been sent for trial before the assessor of the Passage Court at Liverpool, under the 3 & 4 W. 4, c. 42, s. 17, was drawn up "on reading the writ of trial, the assessor's notes, and the affidavit verifying the same." In this affidavit, the deponent described himself as "Thomas Henry Sanger, clerk to Edward James, Esq., barrister at law, and assessor of the Court of Passage of the borough of Liverpool," without giving his place of residence:—Held, that the affidavit was insufficient; and that, without an affidavit verifying the notes, there were no materials upon which the court could entertain the motion.

THIS was an action tried before the assessor of the Court of Passage at Liverpool, by writ of trial, pursuant to the statute 3 & 4 W. 4, c. 42, s. 17. A verdict having been found for the plaintiff, subject to a motion to enter a verdict for the defendant, or a nonsuit, upon a point of law reserved,

*Byles*, Serjt., on a former day in this term, obtained a rule nisi accordingly. The rule was drawn up "on reading the writ of trial, a copy of the assessor's notes of the trial, and the affidavit verifying the same." In the affidavit the deponent described himself as "Thomas Henry Sanger, clerk to Edward James, Esq., barrister-at-law, and assessor of the Court of Passage of the borough of Liverpool," without giving his place of residence.

*Birnie*, for the plaintiff, upon the authority of *Daniels v. May*, 5 Dowl. P. C. 88, and *Elton v. Martindale*, 5 D. & L. 248, objected that the affidavit verifying the assessor's notes was defective, inasmuch as it omitted to state the deponent's place of residence, and therefore could not be read. [MAULE, J.—Was any affidavit necessary? CRESSWELL, J.—The rule requiring the affidavit was made in Easter Term, 4 W. 4 (see 4 Moore & Scott, 484); and it provides, "that, upon all motions respecting causes tried before sheriffs or judges of inferior courts of record, pursuant to the statute 3 & 4 W. 4, c. 42, ss. 17, 18, the party making \*417] the application to the court \*above must produce an examined copy of the notes of the sheriff or his deputy, or of the judge who tried the cause, together with an affidavit verifying such to be a true copy; and also, in cases where no counsel has been retained to conduct

the cause or defence in the court below, an affidavit setting forth the cause or nature of the application." JERVIS, C. J.—Does that rule apply to the Court of Passage? It applies to all cases tried before any inferior jurisdiction under the powers of the 3 & 4 W. 4, c. 42, s. 17. [CRESSWELL, J.—In *Metcalf v. Parry*, 2 Dowl. P. C. 589, Patteson, J., compelled the sheriff to pay the costs incurred in consequence of his under-sheriff's refusal to furnish his notes taken on the trial of an issue.]

*Byles*, Serjt., and *Unthank*, in support of the rule.—The rule of Easter Term, 4 W. 4, was not acted upon in the case of the late Serjt. Arabin, who invariably declined to furnish notes. It may be that the court may compel a sheriff, over whom it has a general jurisdiction, to furnish notes; but the same reasoning can hardly apply to the judge of a court of this sort. It may, therefore, be taken as if the rule were drawn up on reading the writ of trial, and the endorsement thereon only. [JERVIS, C. J.—Have we not a special jurisdiction over an inferior court to which we have directed a writ of trial? The court will not allow justice to be defeated for the want of an affidavit of this sort. The object of the rule of Hilary Term, 2 W. 4, reg. I, s. 5, which requires that "the addition of every person making an affidavit shall be inserted therein," is, merely to establish the identity of the party: and it is in many cases departed from in its strictness: for, instance, when the deponent is either plaintiff or defendant in the cause, no further description of him is required,—*Shirer v. Walker*, 3 Scott N. R. 235, 2 M. & G. 917 (E. C. L. R. vol. 40); so, where the \*deponent is clerk to an attorney, it is enough for him to describe himself as "clerk to A. B., of," &c.,—*Strike v. Blanchard*, 5 Dowl. P. C. 216. Here, the deponent describes himself as clerk to the judge of the court. [MAULE, J.—No: he does not describe himself as clerk in the official capacity of Mr. James.]

JERVIS, C. J.—"A. B., clerk to C. D., defendant's attorney," is not a sufficient description of a deponent: *Daniels v. May*, 5 Dowl. P. C. 83. So, "H. B., clerk to the above-named defendant," is not a sufficient description,—*Elton v. Martindale*, 5 D. & L. 248. I think we are bound by these decisions to hold that this affidavit is insufficient: and, if so, we have granted a rule upon reading an affidavit which ought not to have been read. A technical objection (a) is thus made by another technical objection which must prevail.

The rest of the court concurring,

Rule discharged.

(a) The rule was moved on the ground that the action, which was an action of assumpsit for money lent, money paid, and for money found due upon an account stated, ought to have been a special action upon a guarantee.



\*419] \*EDWARDS and Another, Assignees of RICHARD PARKER,  
a Bankrupt, v. THE GREAT WESTERN RAILWAY COM-  
PANY. May 31.

In an action by a carrier against a railway company, to recover back excessive and unequal charges made upon him for the conveyance of his goods, a verdict was entered for the plaintiff, for 10,000*l.*, subject to a special case to be settled by a barrister, who, *in the event of the court deciding in favour of the plaintiff*, was by the order of reference empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were referred, subject to the special case,—the costs “of the action” to abide the event of the award, and the costs “of and incident to the reference and award” to be in the discretion of the arbitrator.

The special case, as settled by the referee, divided the plaintiff’s claim into six several heads; and, the court having decided in the plaintiff’s favour upon four of them, and for the defendants on the rest of the case, the matter went back to the arbitrator, who ultimately directed that the verdict should be entered for the plaintiff for 3115*l.*, and that so much of the issue as related to that sum should be found for the plaintiff, and the residue thereof for the defendant: and he further directed that all the costs of and incident to the reference and award should be paid by the defendants:—

Held, that the costs of the attendances before the referee to settle the special case, were costs *in the cause*; and therefore that the master was justified in apportioning them according to the decision of the court upon the several heads of claim in the special case.

The company’s act of incorporation, 5 & 6 W. 4, c. cvii., s. 223, requiring that they should have a notice of action,—the plaintiff, at great labour and expense, prepared and delivered a notice accompanied by voluminous accounts of the several packages upon which the overcharges were alleged to have been made, together with the dates and other particulars. The master having allowed the plaintiff 100*l.* for the preparation of the notice and the accompanying accounts, and 170*l.* for one fair copy only:—The Court, on the plaintiff’s motion, refused to order a review of the taxation, on the ground that the allowance for preparing the notice was *inadequate*, and that two fair copies should have been allowed: and afterwards, upon the defendants’ motion,—post, p. 434,—directed a review, on the ground that the 100*l.* was an *excessive* allowance, inasmuch as this was an expense necessarily incurred by the plaintiff in preparing himself to bring the action.

The master also disallowed a charge of 566*l.* 17*s.* 4*d.* for a voluminous notice to admit, pursuant to the rule of Hilary Term, 2 W. 4, r. 20, setting forth descriptions of upwards of 21,000 tickets and receipts for goods carried by the company for the plaintiff and moneys paid on account thereof:—Held, that the master had exercised a sound discretion in so doing,—the notice, though apparently in strict compliance with, being virtually in fraud of, the rule of court.

THIS was an action of debt brought by the plaintiffs, as assignees of Richard Parker, a bankrupt, who had carried on the business of a carrier, to recover the amount of overcharges paid by Parker to the defendants, for the carriage of goods by them, as common carriers, on the Great Western Railway, for Parker, between the 1st of May, 1844, and the 31st of May, 1846; such overcharges having been made partly by charging Parker more than was warranted by the proper construction \*420] of \*the printed scale of charges for the carriage of goods fixed and issued by the company under the powers of their acts of parliament, and partly by charging him more than they charged to tradesmen and others not carriers, under circumstances which the company contended were unlike the circumstances under which they carried goods for Parker, but which this court, upon the argument of the special case hereinafter mentioned, considered to be “like circumstances” in point of law.

A month before action brought, the plaintiffs gave the defendants a notice of action, pursuant to the 223d section of the company's act of incorporation, 5 & 6 W. 4, c. cvii., referring to and accompanied by forty-one books of account containing the full particulars of the several overcharges, consisting of many thousand items, exceeding in the whole fifteen thousand folios.

The particulars of demand delivered with the declaration, stated, "that the action was brought to recover 6320*l.* 7*s.* 9*d.* for moneys overcharged by, and paid to, the defendants by the said Richard Parker upon or in respect of the carriage of certain goods carried by the defendants for the said Richard Parker, between the month of May, 1844, and May, 1846, and before he became bankrupt,—the full particulars whereof were contained in the notice of action duly served upon the secretary of the defendants before the commencement of this suit, and in certain books or accounts which accompanied and were delivered with such notice."

The form of the notice of action and books of account was settled by counsel, who was of opinion that the particulars contained in the books of account were necessary to be given, in order to enable the defendants to judge to what amount, if any, they had overcharged Parker, and to tender amends if they thought proper so to do.

\*Notice to inspect and admit numerous documents was given to the defendants; and, in order, as it was said, to avoid the inconvenience and expense of the great length to which such notice would have extended if the several documents had been described therein, the notice was accompanied by lists specifying the documents, and which lists were referred to in and formed part of such notice. The originals of some of these documents were in the possession of the defendants: they consisted of ticking-off notes, or carriers' declarations, and receipts, relating to the goods, and the charges in question in the action, and amounted in number to upwards of twenty-one thousand, many of them having been made out by different persons, and under different systems of charging, and each of them relating to a distinct lot of goods going from and to various stations on the defendants' railway; and which the plaintiffs were advised were material and necessary evidence in support of their claim.

The defendants not having consented within forty-eight hours to make the admissions specified in the above notice, or any of them, the plaintiffs took out a summons calling upon the defendants, in the usual form, to show cause why they should not consent to make such admissions, or, in case of refusal, be subject to the costs of proof. This summons was heard before Maule, J., on the 23d of June, 1849, when his lordship ordered, that, unless the defendants should, on or before Tuesday then next, elect to admit, and give notice to the plaintiffs' attorney that they would admit, all or any of the said documents in the said

notice, the costs of proving the said documents, or such of them as they should refuse to admit, should be paid by the defendants. The defendants afterwards elected to admit all the documents mentioned in the notice, with certain exceptions; but the learned judge made no \*422] order respecting the costs \*of the application, and the costs of the production and inspection of the documents mentioned in the notice.

The cause came on to be tried before Wilde, C. J., at the sittings in London after Michaelmas Term, 1849, when a verdict was entered for the plaintiffs, by consent, debt 10,000*l.*, damages 2000*l.*, costs 40*s.*, subject to a special case, to be settled by W. A. Rew, Esq., who, in the event of the court deciding in favour of the plaintiffs, was thereby empowered to direct for what amount the verdict should be entered, and to whom *the cause, and all matters in difference between the parties*, were thereby referred, subject to the special case; the costs of the action, to be taxed, to abide the event of the award, and the costs of and incident to the reference and award to be in the discretion of the arbitrator.

The arbitrator proceeded to take evidence, and about thirty meetings were held before he settled the special case. The special case was at length settled, and delivered to the parties in Trinity Vacation, 1851. It divided the claim of the plaintiffs into six several heads,—the first four being claims in respect of alleged excessive or unequal charges made by the company for the carriage of Parker's goods,—the fifth, a claim for compensation for assistance afforded to the company by Parker's men, in the weighing, loading, and unloading of the goods,—and the sixth, a claim for interest upon the alleged overcharges.

The special case was argued in Michaelmas Term, 1851, when the court decided in favour of the plaintiffs upon the first four heads of claim, and for the defendants upon the fifth; and, as to the sixth, they held that the arbitrator might, if he thought fit, under the submission of "all matters in difference," award the plaintiffs interest,—vide 11 C. B. 588 (E. C. L. R. vol. 73).

The case then went back to the arbitrator, who, after having held \*423] three or four meetings to ascertain the \*amount for which the verdict should be entered, on the 13th of February, 1852, made his award, whereby he directed that the verdict should be entered for the plaintiffs for 8115*l.* debt, 1*s.* damages, and 40*s.* costs; and that so much of the issue as related to the sum of 8115*l.* should be found for the plaintiffs, and the residue thereof for the defendants; and that "all the costs of and incident to the reference and award should be paid and borne by the defendants."

Upon the taxation of costs, the plaintiffs claimed, in respect of the notice of action and books of account, the following items:—

"Drawing forty-one books of account, being for overcharges, containing full particulars of claims, folios 15,335 and upwards . . . . .	776 15 0
"Two copies thereof in duplicate, one to deliver with notice, and the other to prove on trial . . . . .	511 3 4
"Paid for paper, ruling, and printing heading to the books . . . . .	37 11 6
"Instructions for notice of action . . . . .	0 13 4
"Drawing very special notice with reference to the particulars of claims and demands, and copy for counsel to settle, fo. 22 . . . . .	1 9 4"

The attorney for the defendants contended before the master, that no notice of action was necessary; that the 223d section of the 5 & 6 W. 4, c. cvii., was repealed by the 7 Vict. c. iii.; and that, if notice of action was necessary, the books of account were unnecessary, and that therefore a nominal sum only should be allowed for the costs of the notice. The master allowed as follows:—

"Preparing the books, at folios 10,000 . . . . .	100 0 0
"One fair copy . . . . .	170 0 0
"Paid for paper, printing heading, &c. . . . .	35 0 0
[Less 5 <i>l.</i> in respect of the portion of the claim not recovered.]	
"Drawing notice of action, &c. . . . .	1 2 0"

\*The plaintiffs claimed in respect of the notice to inspect and admit, and the lists of documents therein referred to, the following items:— [\*424]

"Drawing list (No. 1) referred to in notice to admit, being the declarations required by the defendants to be signed by the carriers, and filled up by Mr. Parker, containing the description of the goods, with the names of the persons to whom they were to be ultimately delivered, and the several weights, &c., before the goods would be received by the defendants at the stations of transit, up to the 2d of August, 1845, folios 3154 . . . . .	157 14 0
"Drawing list (No. 1, a) referred to in notice to admit, being the receipts signed by the servants of the defendants for the goods delivered to them between the 3d of August, 1845, and 31st of May, 1846, folios 3570 . . . . .	178 10 8
"Two copies of the whole in duplicate,—one to deliver, and one to prove on the trial, viz., notice to admit, fo. 16, to produce, fo. 8, list No. 1, fo. 3154, No. 1, a, fo. 3570, No. 2, fo. 18, No. 3, fo. 3,—total, folios 6769 . . . . .	225 12 8
"Paper paid the whole . . . . .	5 0 0"

The master allowed in respect of the notice to inspect and admit, the following sums only:—

"Drawing notice to inspect and admit, very special, referring to several lists of documents numbered and marked respectively as set forth in the notice, fo. 16, and copy for counsel to settle . . . . .	1 1 4
"Drawing notice to produce, and copy . . . . .	0 12 0
"Instructions to counsel to settle both . . . . .	0 13 4
"Paid his fee, and clerk . . . . .	1 3 6
"Attending him . . . . .	0 3 4"

The master refused to allow the above items of 157*l.* 14*s.*, 178*l.* 10*s.* 8*d.*, 225*l.* 12*s.* 8*d.*, and 5*l.*, on the ground that the lists of documents were not necessary.

He further disallowed to the plaintiffs all the costs incurred by them of and incident to the portion of their demand comprised in the fifth and sixth heads of claim \*mentioned in the special case, in respect of which the plaintiffs did not recover in the action,—up to the time of the judgment of the court upon the hearing of the special case; [\*425]

and he allowed to the defendants their costs of and incident to those two heads of claim up to the same period; on the ground that all the costs of the meetings before the arbitrator up to the time of the hearing of the special case, and the judgment thereon, were costs *in the action*, and that the reference did not commence until after the judgment; although it was contended before the master, on behalf of the plaintiffs, that the costs of all the meetings before the arbitrator, as well before as after the judgment of the court on the special case, were costs "of and incident to the reference and award," and not costs in the action, and that the plaintiffs were entitled to the whole of such costs.

*J. Brown*, for the plaintiffs, moved for a rule to show cause why the master should not review his taxation. The charge for the preparing the notice of action was improperly reduced. The defendants' act of incorporation, 5 & 6 W. 4, c. cvii., s. 223, enacts "that no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person, for anything done, or omitted to be done, in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under this act, until twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding, to the intended defendant." In *Kent v. The Great Western Railway Company*, 3 C. B. 714 (E. C. L. R. vol. 54), 4 D. & L. 481, the costs of a similar notice were held to have been properly allowed; but the court refused to enter upon the question of amount. A notice being necessary, it would be

\*426] idle to give the company one that would give them no information as to the nature and amount of the claim made upon them. [JERVIS, C. J.—It seems to me that you might as well, in a notice of action against a magistrate, give every item of a doctor's bill.] This precise question has never yet been presented to the court. [JERVIS, C. J.—Do you find any case where it has been held that particulars of demand may be dispensed with, where a notice of action has been given?] No. The 224th section of the act shows the object of requiring the notice of action; (a) and that object could not be attained unless the notice was specific. If the overcharges complained of had extended over a short period only, the necessary details would not have appeared so startling as the aggravated enormity of the company's

(a) That section enacts "that no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, or in, under, or by virtue of any power or authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and, in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court, such sum of money as he shall think fit; whereupon, such proceedings, order, and adjudication shall be had and made in and by such court, as in other actions where defendants are allowed to pay money into court."

extortion now makes them appear. There are many authorities to show that a notice of action must be specific. Thus, in *Martins v. Upcher*, 3 Q. B. 662 (E. C. L. R. vol. 43), 2 Gale & D. 716, it was held, that a notice of action to a magistrate, under stat. 24 G. 2, c. 44, s. 1, must specify the place at which the act complained of occurred; it is not enough that it names the day: and the omission is not cured by the magistrate's pleading a tender of amends, under s. 2. \**[MAULE, J.—There, the act requires that the causes of action "shall be* [\*427 *clearly and explicitly contained" in the notice. Here, the act contains a simple provision that you shall not bring an action until after twenty days' notice of your intention to do so shall have been given.]* In *Freeman v. Line*, 2 Chitt. Rep. 678,—which was cited in *Martins v. Upcher*,—a road act (16 G. 3, c. lxxx.) enacted that no action or suit should be commenced for anything done in pursuance of the act, until twenty-one days' notice should be thereof given to the clerk of the trustees: an action was brought for taking toll in respect of things exempted; and the notice stated the intended action to be, "for demanding and taking of me toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, intituled, &c.:" and this was held to be too uncertain. So, in *Breese v. Jerdein*, 4 Q. B. 585 (E. C. L. R. vol. 45), 2 Gales & D. 720, n., it was held, that a notice of action against an officer of the metropolitan police, under the 10 G. 4, c. 44, s. 21, must specify the time and place of committing the act complained of. *[JERVIS, C. J.—I think the sum already allowed is much too large. The plaintiffs must have ascertained the amount of the alleged overcharges before they thought of bringing the action.]* It is sworn that the making out of the account of the overcharges occupied ten or twelve clerks during a large portion of three years. *[MAULE, J.—The expense of acquiring information necessary to enable a party to commence an action, is never allowed.(a)]*

The master allowed only the cost of making one fair copy of the notice. The plaintiffs were clearly entitled to a fair copy to keep, so as to be able to produce it in evidence, if necessary. *[JERVIS, C. J.—The master says \*he considered the draft sufficient for that* [\*428 *purpose. I cannot say that there is any practice upon the sub-* *ject. MAULE, J.—The draft was good enough.]* If the action had been brought for a week's extortion, instead of two years', the extra copy would have been allowed as a matter of course. *[MAULE, J.—Very possibly.]*

Then, as to the notice to inspect and admit,—it was necessary to send the defendants a list of the declarations and receipts which they were required to admit. Without such notice, the plaintiffs would have

(a) See *Pilgrim v. The Southampton and Dorchester Railway Company*, 8 C. B. 25 (E. C. L. R. vol. 65).

been deprived of the costs of proving these several documents on the trial, by the rule of Hilary Term, 4 W. 4, r. 20: and there is no greater particularity of description in this notice than is required by the schedule annexed to that rule. [JERVIS, C. J.—Before the rule,—which was intended to diminish the expense of proof of documents,—a single witness would have produced them all, at an expense, probably, of 13s. 4d.] It may be that the application of that rule to this case has very much enhanced the expense of the notice: but the rule makes no exception; the plaintiffs were bound to give the notice, and in the form pointed out. The plaintiffs' attorney has strictly followed the rule of court. [JERVIS, C. J.—Taken advantage of it, you mean. If the defendants had objected to a general notice, it would have been time enough to incur all this expense. MAULE, J.—This being so very peculiar a case, the plaintiffs should have applied for some special order upon the subject.(a)]

\*429] \*By the order of reference, the costs of the cause were to abide the event of the award, and the costs of and incident to the reference and award were to be in the discretion of the arbitrator. Of the latter, the arbitrator has disposed, by directing that they should be paid by the defendants. The Court having decided in favour of the plaintiffs upon four out of the six heads of claim stated in the special case, the arbitrator has awarded them 3115*l.*, and directed that so much of the issue as related to that sum should be found for the plaintiffs. In taxing the costs, the master \*430] \*considered that the "costs of the action" comprehended the costs of the meetings held

(a) The rule is as follows:—"Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and, unless the adverse party shall consent, by endorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And, unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge, or other presiding officer, certified by his endorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

"Provided, that, if the judge shall think the application unreasonable, he shall endorse the summons accordingly.

"Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions, for inspection and examination, and impose such terms upon the party requiring the admission as he shall think fit.

"If the party required shall consent to the admission, the judge shall order the same to be made.

"No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have endorsed upon the summons that he does not think it reasonable to require it.

"A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause."

before the arbitrator for the purpose of settling the special case, and that the "costs of and incident to the reference and award" comprised only the costs of the meetings held before the arbitrator, for the purpose of settling the amount of the verdict, after the decision of the court had been pronounced upon the special case: and therefore he allowed the defendants so much of the costs of all the meetings anterior to the judgment pronounced by the court, as related to those parts of the issue upon which the plaintiffs had not succeeded. It is submitted that this was wrong; and that the "costs of and incident to the reference and award," properly comprehended the costs of *all* the meetings held before the arbitrator. [JERVIS, C. J.—When did the cause cease?] Not until final judgment. [MAULE, J.—The obvious meaning of the order of nisi prius, is, that such part of the costs of the reference and award as do not constitute costs of the cause, are to be in the arbitrator's discretion.] That can hardly be the fair meaning of the order. [CRESSWELL, J.—Suppose a reference to settle a special case, nothing being said about costs,—would not the plaintiff, if he succeeded, be entitled to the costs?] In Dax's Master's Practice, 209, it is said: "In general, the costs of a reference to arbitration are specially provided for in the submission to arbitration: but in some cases they are taxed and allowed as costs in the cause. Thus, in an action of trover, where a verdict being found for the plaintiff for the full value of the goods, the plaintiff consented to take them back, it being referred to an arbitrator to ascertain to what amount they had been deteriorated in value,—it was held that the costs of such reference were costs in the cause. In such a case, the arbitrator is merely put in the place of the jury to assess the damages, and perfect the verdict, which is in fact a benefit to the \*defendant: *Tregoning v. Attenborough*, 5 Moore & P. 453, 7 Bingh. 733 (E. C. L. R. vol. 20), 1 Dowl. P. C. 225. And, generally, the costs of the reference at nisi prius are taxed as costs in the cause, where the reference is solely of the matters in dispute in the action, and the verdict is entered upon the certificate of the arbitrator: but, where the order of nisi prius is silent as to the costs of the reference and award, and other matters than those in the action are referred, the costs of the reference are not costs in the cause, but each party must bear his own expenses, and half the costs of the award. In the case of referring matters in difference other than those at issue in the cause, the costs cannot be allowed as costs in the cause:" *Taylor v. Lady Gordon*, 9 Bingh. 570 (E. C. L. R. vol. 23), 2 M. & Scott, 725, 1 Dowl. P. C. 720. [CRESSWELL, J.—Up to the statement of the case here, the reference could only be of matters in difference in the cause.] In *Brown v. Nelson*, 13 M. & W. 397,† it was expressly held that the costs of witnesses examined before an arbitrator on a reference of a cause, to prove the issues in the cause, are not costs in the cause, but costs of the reference. Whatever may be



the rule where the reference is of the cause only, it is different where the reference is of all matters in difference also. [MAULE, J.—Mr. Rew had to settle the special case before the character of arbitrator is conferred upon him. The reference arises only when the court has decided on the special case.]

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. Three points have been pressed before us,—first, that the master has not allowed the plaintiffs enough for preparing the notice of action,—secondly, that the costs of the notice to inspect and admit were improperly disallowed,—thirdly, that the master has put an erroneous construction upon the order of reference.

\*432] 1. Mr. Brown complains that the allowance of 100*l.* for the preparation of the books containing the items of overcharge sought to be recovered back, was insufficient, inasmuch as it was necessary that the notice should distinctly and explicitly inform the defendants of the nature and extent of the claim made upon them. I must confess I think the allowance too large. It is perfectly well known that the plaintiff is not allowed to charge the defendant with the expenses necessarily incurred by him in searching for evidence and preparing to support his action. This is, in truth, a claim of that sort. The plaintiffs have necessarily incurred great expense in preparing themselves for this action; and they now seek, under colour of a notice of action, to recover that which they could not be entitled to charge upon the defendants in any other way. It was suggested also that the master ought to have allowed the plaintiffs a second fair copy, to keep. If the amount had been small, it would probably have escaped the master's attention: but, seeing that the cost was so extremely heavy, I think he has exercised a very sound discretion in disallowing it.

2. As to the notice to inspect and admit,—I think, that, notwithstanding the rule of court, the master very properly declined to allow the exorbitant charge made for this notice. Here is a matter which, under the old practice, could not have cost at the outside more than 20*l.*, now, under a rule of court which professes to have been framed for the purpose of diminishing expense, is sought to be made a pretext for imposing upon the defendants costs to the extent of 566*l.* 17*s.* 4*d.*! I think the master was quite right in discountenancing such an abuse. If the plaintiffs had found themselves in any difficulty resulting from a rule of court, in consequence of the defendants' refusing to admit what \*433] ought to be admitted, the plaintiffs might have gone before a judge, and possibly they might in the result have been justified in shaping their notice in this way. But they had no right to take advantage of a technical rule, for the mere purpose of overwhelming the defendants with costs. They should have acted on the spirit, instead of upon the letter of the rule. It is, in truth, but an indirect way of attempting to obtain that which was not obtainable directly.

3. The third question arises upon the construction of the rule of reference. I do not for a moment question the soundness of the decision of the Court of Exchequer in *Brown v. Nelson*, 18 M. & W. 397.† Where there is a reference of the cause and all matters in difference, it may well be that costs of the cause cease when the reference begins. But the question here, is, when did this reference begin? The true test seems to me to be this:—If the decision of the court upon the special case had been in favour of the defendants, the matter never would have gone back to Mr. Rew at all; and he would have had no power over the costs. The reference, in fact, never commences until after the decision of the court in the plaintiffs' favour. It seems to me that the cause was proceeding until the special verdict was settled: and, if so, the master was right in apportioning the costs in the manner he has done.

MAULE, J.—I entirely agree with the Lord Chief Justice: and I do not propose to add anything, except as to the last point. As to that, I would wish to call attention to the terms of the order of reference, which is a very special one, and not necessarily to be governed by cases upon references in the common and ordinary form. The authority given to Mr. Rew, is, “to settle the special case, and, “in the event of the court deciding in favour of the plaintiffs,” to “direct for what amount the verdict shall be entered:” that is to say, his power is, simply to \*ascertain the amount of the verdict, and arises only in the event of the court deciding in favour of the plaintiffs on the [\*434 special case. It was a contingent submission of the cause and all matters in difference, in the event of the decision of the court upon the special case showing that the plaintiffs had any cause of action at all. The costs incident to the settlement of the special case were unquestionably costs in the cause, and not costs of the reference and award; and they have been properly dealt with by the master.

CRESSWELL, J.—I am of the same opinion upon all the points.

Rule refused.

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*Channell*, Serjt., for the defendants, on a subsequent day, moved for a rule to show cause why the taxation should not be reviewed, as to the allowance for the costs of the notice of action. He conceded, that, after the decision of this court in *Kent v. The Great Western Railway Company*, 3 C. B. 714 (E. C. L. R. vol. 54), 4 D. & L. 481, where the matter was fully considered, it could not successfully be contended that a notice of action was not necessary: but he submitted there was no pretence for a notice of such exorbitant length,—which was, in effect, an attempt to make the defendants responsible for costs which were properly costs as between attorney and client.

*J. Brown*, on a subsequent day, showed cause.—The objection sought

to be raised to the allowance made by the master in respect of the notice of action, is, that it is, in part at least, an expense necessarily incurred by the plaintiffs in getting up their case. That, however, is a \*435] fallacy. No case can be found where the costs of \*preparing a document which is required by act of parliament to be served upon the opposite party, have been disallowed on any such ground. Maps, plans, and surveys, are sometimes allowed in costs as between party and party: *Holmes v. Holmes*, 2 Bingh. 75 (E. C. L. R. vol. 9), 9 J. B. Moore, 158 (E. C. L. R. vol. 17); *Pilgrim v. The Southampton and Dorchester Railway Company*, 8 C. B. 25, 42 (E. C. L. R. vol. 65). [MAULE, J.—Those may be allowed; but not the expense of obtaining the information necessary to enable the surveyor to prepare them.] The true principle on which to determine whether the costs should or should not be allowed, is this,—are they damages legitimately resulting from the detention of the money? [MAULE, J. No.—The statute of Gloucester, 6 Edw. 1, c. 1, gives the plaintiff the costs of his “writ purchased,” which the courts have expanded so as to embrace many other things after the writ which go to show the plaintiff’s right to recover the verdict.] Costs of every proceeding in the suit are regarded as damages incurred by the plaintiff: and the inclination of the courts has always been to make them as far as possible an indemnity to the plaintiff. A general notice of action here would have been idle: the plaintiffs were bound to give such a notice as would fairly inform the defendants what was charged against them, so as to enable them to tender amends, or to pay money into court. [MAULE, J.—Where the action is of a divisible nature, it may well be that the notice must comprehend the whole and every part of the cause of action. JERVIS, C. J.—To support his rule, my Brother Channell must make out that it is perfectly clear that the short form of notice would suffice.]

*Channell*, Serjt., in support of his rule.—The master ought not to have allowed the plaintiffs anything for the labour and expense incurred by them in the acquisition of information necessary to enable them to \*436] give the \*notice. He has allowed 100*l.* for preparing the notice, and 170*l.* for a fair copy. [MAULE, J.—I think the master must review his taxation as to the sum allowed for preparing the notice.] He should also be directed to inquire whether the notice does not go into particulars unnecessarily minute, so as needlessly to aggravate the cost of the copy. [MAULE, J.—I think the plaintiffs might fairly give the particulars of the several packages upon which the alleged overcharges were made.]

JERVIS, C. J.—I do not think the particulars given are so clearly unnecessary, that the last objection should be allowed to prevail. The taxation must be reviewed with reference to the 100*l.* allowed for preparing the notice. Nothing is to be allowed which properly concerns the preparation for the bringing of the action, or the acquisition of

the knowledge necessary to enable the plaintiffs to give a notice of action.  
Rule absolute.

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\*FRYER and Others v. ROE. May 28. [\*437

A promissory note was given by the defendant to the plaintiffs in 1840, payable, five years after date, for value received:—Held, that it was evidence of an account stated, against which the statute of limitations did not commence running until the maturity of the note.  
A special verdict must find the facts, and not consist of a mere statement of evidence.

DEBT, upon a promissory note for 140*l.* 11*s.* made by the defendant on the 1st of April, 1840, and payable, five years after date, to the plaintiffs, or order.

Second count, that the defendant, on, &c., was indebted to the plaintiffs in the sum of 240*l.* 11*s.* for money found to be due from the defendant to the plaintiffs upon an account then stated between them, which said last-mentioned money was to be paid by the defendant to the plaintiffs on request; whereby an action had accrued, &c.

There were four pleas to the first count, as to the issues joined upon which the jury were by consent discharged from giving any verdict.

The pleas to the second count were,—never indebted, and that the cause of action did not accrue within six years from the commencement of the suit; upon which pleas issues were joined.

At the trial before Talfourd, J., the jury returned a special verdict, finding in substance as follows:—

That, upon the first of April, 1840, the defendant made his promissory note in writing in the words and figures following,—

£140 11 0

“Blandford, 1st April, 1840.

“Five years after date, I promise to pay to Messrs. Fryer, Andrews, & Co., or order, one hundred and forty pounds, eleven shillings, for value received.

“JOHN BANNISTER ROE.”

That the defendant thereupon then delivered the said note to the plaintiffs, who then became and were the holders thereof, and so continued until and at the trial of \*the said issues: That the defendant so made and delivered the said note, and that the plaintiffs [\*438 so became holders of the said note, more than six years and three days before the commencement of this action; and that, the said period of five years from the time of making the said note having elapsed, the said note became due and payable to the plaintiffs on the 4th of April, 1845, which last-mentioned day was within six years next before the commencement of this action: But, whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the defendant ever was indebted as in the last count alleged, and whether or not the said cause of action in the said second count mentioned did accrue to the plaintiffs within six years next before the commencement

of this suit, in manner and form as within alleged, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the court, &c.; and if, upon the whole matter, it shall seem to the said court that the defendant was indebted to the plaintiffs in the sum of 140*l.* 11*s.*, parcel of the debt within mentioned, in manner and form as in the said last count alleged, but not in the residue of the said supposed debt as in the said last count mentioned, or any part thereof, then the jurors aforesaid upon their oath aforesaid say that the defendant was indebted to the plaintiffs in the said sum of 140*l.* 11*s.*, parcel, &c., in manner and form as in the said last count alleged, and was not indebted to the plaintiffs in the residue of the said supposed debt in the said last count mentioned, or any part thereof; but if, upon the whole matter aforesaid, it shall seem to the court that the defendant never was indebted in manner and form as in the said last count alleged, then the jurors aforesaid upon their oath aforesaid say that the defendant never was indebted accordingly; and if, upon the whole matter aforesaid, it shall seem to the said court that the said cause of action \*489] in the said last count \*mentioned did accrue to the plaintiffs within six years next before the commencement of this suit, in manner and form as within alleged, the jurors aforesaid upon their oath aforesaid say that the said last-mentioned cause of action did accrue to the plaintiffs within six years next before the commencement of this suit, in such manner and form as last within alleged; and in that case they assess the damages of the plaintiffs on the occasion of the detaining the said debt of 140*l.* 11*s.*, over and above the costs and charges by them about their suit in that behalf expended, to 1*s.*, and for their costs and charges to 40*s.*: But if, upon the whole matter aforesaid, it shall seem to the said court that the said last-mentioned cause of action did not accrue to the plaintiffs within six years next before the commencement of this suit, in such manner and form as in that behalf is alleged, then the jurors aforesaid, upon their oath aforesaid, say that the said last-mentioned cause of action did not accrue to the plaintiffs within six years next before the commencement of this suit, in such manner and form as in that behalf is alleged.

*Wise* (with whom was *Byles*, Serjt.), for the plaintiffs.—The promissory note set in the special verdict constituted an account stated between the defendant as the maker and the plaintiffs as the payees, upon which an action of debt was maintainable after the note became due: and, until that time, the statute of limitations did not begin to run: and, therefore, upon the facts found by the jury, the verdict ought to be entered for the plaintiffs upon both the pleas to the second count: *Wheatley v. Williams*, 1 M. & W. 533,† where the Court of Exchequer held that an instrument whereby the defendant promised to pay the plaintiff the balance of his account in two years, was evidence of an account stated at the time it was signed, but that it showed also that

the \*cause of action did not accrue until two years afterwards; and therefore that the action was well brought within six years after the expiration of that time. In *Williams v. Moor*, 11 M. & W. 256, 265,† *Parke, B.*, describes the account stated as a making certain of the previously uncertain state of the transactions between the parties, and getting rid of the necessity of preserving vouchers. Here, the sum is ascertained and fixed, but not payable until the maturity of the note. In *Wittersheim v. The Countess of Carlisle*, 1 H. Blac. 631, it was held, that, where a bill of exchange is drawn for money lent by the payee to the drawer, payable at a future time, the statute of limitations runs only from the maturity of the bill; the court saying, that, “though, on a mere loan of money, the time of limitation might commence from the date of the loan, yet, where the money was lent on a special contract for repayment, it was the time of the repayment that ought to fix the period of the limitation. Until that contract was broken, there was no cause of action.” So, in the case of goods sold, to be paid for at a future day, the statute runs only from the expiration of the credit. In *Irving v. Veitch*, 3 M. & W. 90,† the defendant was indebted to the plaintiffs in a balance of 2245*l.*, for which they held his overdue promissory note. In 1827, the plaintiff and defendant agreed that the defendant should pay the balance as follows,—245*l.* in cash, and the remainder by annual payments of 300*l.* a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiffs should hold his promissory note as security for the payment of the account. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828, and 1829, but the defendant made default in payment of it in September, 1830: and it was held, that the plaintiffs were entitled, at any time within six years from September, 1830, to sue the defendant on the promissory note, or, \*for the balance remaining due, on a count upon an account stated. *Clayton v. Gosling*, 5 B. & C. 560 (E. C. L. R. vol. 11), [441 8 D. & R. 110 (E. C. L. R. vol. 16), illustrates the same principle. It was there held, that, where the maker of a promissory note, payable twelve months after notice, with interest, “for value received,” became bankrupt before notice had been given, the note was provable under the commission, within the 7 G. 1, c. 31: and *Bayley, J.*, said: “Where the amount of a debt is uncertain, or the period at which it is payable is contingent, it is quite clear that it is not provable under a commission. But, where there is an existing debt previous to the commission, payable in future, and the amount of it is ascertained, it is within the 7 G. 1, c. 31, and provable.” In *Christie v. Peart*, 7 M. & W. 491,† the court say: “After the dishonour of a bill, it is payable on request: a promise, therefore, by the acceptor, after the bill is due, to pay it according to the tenor and effect of his acceptance, is a promise to pay it on request. The effect of the acceptance is, after dishonour, to make

the bill payable on request." In *Carr v. Shaw*, Bayley on Bills, 6th edit. p. 28, in an action on a promissory note made at Philadelphia, the first count of the declaration stated that the defendant, at Philadelphia, in parts beyond the seas, to wit, at London, &c., according to the form of the statute, &c., made his note in writing, &c. There were also the common money counts. The defendant demurred specially to the first count, and pleaded the general issue to the others. On the demurrer, the court intimated a strong opinion that the statute 3 & 4 Anne, c. 9, did not apply to foreign notes, and advised the plaintiff to amend: but, on the general issue, Lord Kenyon said,—“The note, though not within the statute, is *evidence to support any of the money counts* ;” and the plaintiff had a verdict, at Guildhall, May 1st, 1799. [JERVIS, C. J.—Do you find any case specifically holding that it is evidence on the account \*442] \*stated ?] Abbott, C. J., in *Rhodes v. Gent*, 5 B. & Ald. 244 (E. C. L. R. vol. 7), says: “It does not seem to me that the particular averment (of presentment where the bill was specially made payable) in the declaration is at all material; for, the bill being payable to the order of the plaintiff, who was the drawer, it would, unless he was guilty of laches, be *evidence on the account stated*.” [JERVIS, C. J.—He gives no reason for it.] *Wheatley v. Williams*, 1 M. & W. 538,† is cited in 1 Saunders on Pleading (by Lush), 45, and in Bayley on Bills, 6th edit. p. 366, in support of the proposition for which it is referred to here. In *Chitty on Bills*, 9th edit. 582, it is said that “a promissory note is evidence of money due from the maker to the payee on an account stated (citing *Story v. Atkins*, 2 Stra. 719, Bull. N. P. 136, 137, *Harris v. Huntbach*, 1 Burr. 373, *Pawley v. Brown*, cor. Abbott, C. J., Devon Lent Assizes, 1818), especially if it be expressed to be for value received,”—*Highmore v. Primrose*, 5 M. & Selw. 65, 2 Chitt. R. 333; *Clayton v. Gosling*, 5 B. & C. 360 (E. C. L. R. vol. 11), 8 D. & R. 110 (E. C. L. R. vol. 16). In *Burmester v. Hogarth*, 11 M. & W. 101,† Parke, B., says: “The endorsement of the bill, in an action by the endorsee against the endorser, may be *prima facie* evidence of an account stated:” and Alderson, B., says: “As between the immediate parties to it, a bill is evidence of an account stated.”

*J. Brown* (with whom was *Crowder*), *contra*.—*Story v. Atkins*, as appears from the report in 2 Lord Raym. 1427, was the case of a promissory note payable on demand. It cannot, on principle, be assumed that a promissory note is given for a strict debt, properly so called; it is difficult, therefore, to see how it can be evidence of an account stated. Although the text-books so lay it down, it will be found, when the cases are looked at, that there is a complete dearth of authority on the subject. It was perhaps reasonable, before the statute of \*443] \*Anne, that a bill or note, as between the immediate parties, should be treated as evidence of money lent; but that reason does not hold now. All the evidence upon this special verdict, is, that the plaintiffs and the defendant met in 1840, and the latter gave the

former this note. If it had been money payable on request, there would have been an end of the question; but it is suggested, that this was an accounting of money due, but not payable for five years. [MAULE, J.—How do you get over *Wheatley v. Williams*?] There is a mere dictum of Lord Abinger on the subject. [JERVIS, C. J.—But the judgment was entered for the plaintiff.] There was another count,—upon the note. The accounting must be of money *then due* and presently payable: *Davies v. Wilkinson*, 10 Ad. & E. 98 (E. C. L. R. vol. 37), 2 P. C. & D. 256; *Hopkins v. Logan*, 5 M. & W. 241,† 7 Dowl. P. C. 360. The modern form of an account stated,—which differs materially from the old one; see *Webber v. Tivill*, 2 Saund. 122,—alleges that the defendant “was indebted to the plaintiff in £— for money found to be *due* (using the word in the sense of a bill or note due, that is, payable on demand), from the defendant to the plaintiff, on an account then and there stated between them.” It can hardly be held that an accounting in 1840, of moneys payable in 1845, supports the count. The judges did not intend, and perhaps had not the power, to alter the meaning of the words in the old form; the object of the new rules being merely to cut down the prolixity of pleading. Suppose the defendant had died between the statement of the account and the maturity of the note? [MAULE, J.—The only question is, whether the modern form of the account stated excludes this evidence. The authorities clearly dispose of the substance of the matter.]

This special verdict does not in terms *find* that an account was stated in 1840, of moneys payable five years afterwards. It is a mere statement of evidence. And \*the court cannot, as upon a special [\*444 case, draw inferences.

*Wise*, in reply, was desired to confine himself to the point of form.—The jury could not have been warranted in finding any verdict but one. The acceptance of a bill is a recognition of the acceptor's having money of the drawer's in his hands at the time. [MAULE, J.—Would the evidence here set out support a count for money lent?] It is submitted that it would. [MAULE, J.—You say it also supports the account stated. Is money lent and an account stated the same thing? Suppose the declaration contained both, upon which would the plaintiffs upon this evidence have judgment?] Upon both. It is evidence of money lent: it is the account stated. [JERVIS, C. J.—It is evidence on the account stated, because it is evidence of money lent. That exposes the fallacy of your argument. MAULE, J.—There must be a *venire de novo*: but I think the defendant ought to have leave to plead the special pleas to the account stated; or, which would be better still, the account stated, which ought never to have been in the declaration, should be struck out.]

JERVIS, C. J.—The only judgment we can pronounce upon this special verdict, is, that there must be a *venire de novo*; and upon this short ground, viz., that it is the duty of the jury to find facts, and not to state



evidence merely. There is no finding here upon either of the two issues: there must, therefore, be a venire de novo.

The rest of the court concurring,

Rule accordingly.

A verdict of a jury submitted to the Court for its judgment as to the law, certain documents and other evidence, oral and written, without finding the facts established thereby. Held, that it was too uncertain and insufficient for a judgment to be founded upon it: *Blank v. Foushee*, 4 Munf. 61.

A special verdict must find facts, not the evidence of facts. No inference can be drawn. Every fact not ascertained by it is supposed not to exist: *Brown v. Ralston*, 4 Randolph, 504; *Lawrence v. Beaubien*, 2 Bailey, 623; *Seaward v. Jackson*, 8 Cowen, 406; *Sisson v. Barrett*, 2 Comstock, 406; *Langley v. Warner*, 3 Comstock, 327; *Wallingford v. Dunlap*, 14

Penna. St. Rep. 31; *The State v. Watts*, 10 Iredell, 369; *Blake v. Davis*, 20 Ohio, 231.

When a special verdict is defective, the proper course is for the Court to award a venire de novo: *Robinson v. Brock*, 1 Rea. & Munf. 213; *Bellows v. Hallowell*, 2 Mason, 31; *Stodder v. Powell*, 1 Stewart, 287; *Sewall v. Gliddon*, 1 Alabama, 52.

An agreed case in the nature of a special verdict, is to be considered as a special verdict found by a jury, and, if it be defective in substance, the judgment rendered upon it will be reversed, and a venire de novo awarded: *Whitesides v. Russell*, 8 Watts & Serg. 44.

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\*BODEN v. WRIGHT. May 28.

A plea of want of consideration, in an action on a bill of exchange, must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned.

ASSUMPSIT on a bill of exchange for 22l. 10s. 8d. drawn on the 11th of September, 1849, by one Charles Murgatroyd upon and accepted by the defendant, payable three months after date, and endorsed by Murgatroyd to the plaintiff. Account stated.

First plea,—as to the first count of the declaration, except as to the sum of 10l., parcel of the moneys in that count mentioned, and the causes of action in respect thereof,—that there never was at any time before, nor was there at the time of the defendant's accepting the said bill of exchange, any value or consideration whatsoever existing for his, the defendant's, so accepting the said bill of exchange; and that he so accepted and delivered the said bill of exchange to the said drawer thereof, and the said drawer thereof then first received the said bill from the defendant so accepted as aforesaid, and thence until he endorsed the same as hereafter mentioned, held the same, on certain terms and for a certain special purpose only, to wit, that he might get the same discounted for the defendant, and pay over the proceeds of such discounting to the defendant, and not otherwise: that the said drawer did not at any time get the said bill discounted for the defendant, or pay over to him any proceeds thereof; but, in violation of, and contrary to, the said terms and purpose on which he so took and held the said bill as aforesaid, and without the consent or authority of the defendant, the said drawer, before the commencement of this suit, to wit, on the day and year last aforesaid, endorsed the said bill to the plaintiff, and the plain-

tiff then first took and received the same from \*him, on other and different terms, and in violation of, and contrary to, the said [\*446 special terms and purpose on which the defendant had so delivered the same to the said drawer, and without in any manner whatever discounting the same: that, when the plaintiff so first took the said bill of exchange by such endorsement as aforesaid, there was not, and that, until after the plaintiff had notice of the premises as hereinafter mentioned, there never was at any time existing any value or consideration whatever for the said endorsement to the plaintiff of the said bill of exchange, except as to the said sum of 10*l.*, parcel, &c.: and that, after the said endorsement to the plaintiff, and before the plaintiff gave, or there ever existed, any value or consideration, except as aforesaid, for the said endorsement, or any contract or agreement for the same, the plaintiff had, to wit, on the same day and year, full knowledge and notice of all the premises in this plea before mentioned: verification.

Special demurrer, assigning for causes, amongst others,—that it is not stated, nor doth it appear, in or by the said plea, with sufficient or any certainty, that there was not a good and sufficient consideration for the defendant's acceptance of the bill declared on before the same became due and payable;—that it is consistent with the plea, that, after the drawer had endorsed the bill as therein mentioned, he gave, or that the defendant received, full consideration to the amount of the bill;—that the allegation that the drawer did not pay over to the defendant any proceeds of the said bill, is ambiguous and altogether immaterial, if the defendant, after the endorsement, assented to such endorsement, and received consideration for his acceptance, which the plea in no way negatives;—and that it does not appear that the drawer held the bill for the purpose in that plea mentioned, at the time he endorsed the same, but merely until he endorsed the same.

\*Second plea,—to the alleged cause of action in the declaration and last preceding plea mentioned, and by the same plea [\*447 pleaded to, and except as aforesaid,—that the defendant accepted and delivered the same bill of exchange, so accepted, to the said drawer thereof, as in the last preceding plea mentioned, and not otherwise; and that the said drawer, until he endorsed the said bill of exchange to the plaintiff as in the first count mentioned, held the same on the terms and conditions, and for the special purpose, in the last preceding plea mentioned, and not otherwise: that the said drawer did not at any time get the said bill discounted, nor was the same, in any way whatever, at any time discounted; but, on the contrary thereof, the said drawer, in violation of and contrary to the said terms and purpose upon and for which he so took and held the same bill, and without the consent or authority of the defendant, endorsed the same bill to the plaintiff,—which is the endorsement in the said first count mentioned; and the plaintiff first took and received the same bill, by such endorsement from

him, on other and different terms, and in violation of, and contrary to, the said terms and special purpose, and without in any manner discounting the same: and that, except as aforesaid, there never was at any time existing any value or consideration for the said endorsement of the said bill to the plaintiff; and that, except as aforesaid, the plaintiff had always been the holder thereof without any value or consideration whatever: verification.

Special demurrer, assigning for causes those contained in the demurrer to the first plea.

The defendant joined in demurrer.

*Willes*, in support of the demurrer.—Neither plea shows with certainty that the defendant received no good consideration for his acceptance. As against an endorsee, the defendant was bound to exclude his \*448] having \*received value for the bill. It appears that the endorsee gave 10*l.* for the bill: in the one plea, he does not seem to have had any notice of the limited purpose for which Murgatroyd received the bill; and in the other, that he had not such notice at the time he paid the 10*l.* *Primâ facie*, the fact of accepting is proof of value. Since the new rules, a plea of want of consideration must do more than merely set forth evidence for a jury of absence of consideration: it must in terms negative the consideration; it must show how there is no consideration. It is quite consistent with these pleas, that the acceptor may, after the endorsement to the plaintiff, have received compensation from Murgatroyd for the alleged wrong done by endorsing the bill. [MAULE, J.—Consistently with this plea, the defendant may, after the endorsement, have received the whole money, minus the discount. If any intermediate endorser got value, that would be inconsistent with the allegation that there was no value or consideration from Murgatroyd to the plaintiff.]

*Cowling*, *contra*.—The statement contained in these pleas comes within what is required by the new rules of pleading. A plea of want of consideration must state affirmatively all the affirmative facts which the defendant is bound to prove to make out a defence, but not negative facts. That follows from the 2d and 3d rules in *Assumpsit*. (a) The acceptance *primâ facie* implying consideration, the defendant must not merely negative the fact of consideration, but he must plead all the affirmative facts necessary to show how the transaction arose. [MAULE, J.—I never saw a plea of want of consideration, without a general allegation that there was no consideration other than that mentioned. In *Carruthers v. West*, 11 Q. B. 143 (E. C. L. R. vol. 63), to a declaration \*449] against the \*acceptor on a bill of exchange drawn payable to the drawer's order, endorsed by him to B., and by B. to the plaintiff, the defendant pleaded that he accepted for the accommodation of the drawer and B., without consideration, and on the terms and conditions that the bill should be negotiated for their accommodation only

(a) See *Jervis's Rules*, 128, 129, and the cases there cited.

before the bill became due ; and that the bill was endorsed to the plaintiff, and the plaintiff became the holder, after it became due : and the plea was held bad, on motion for judgment non obstante veredicto.] Here, the consideration is sufficiently negatived : it is said that the defendant accepted on such terms, and such *only*. [JERVIS, C. J.—The consideration is negatived with reference to the endorsement, but not with reference to the acceptance.] In *Easton v. Pratchett*, 1 C. M. & R. 798,† a plea was held bad because it was in the negative, instead of in the affirmative ; and Lord Abinger, C. B., said : “The new rules do not justify the form of plea. It was intended to make it incumbent upon a defendant to set forth the circumstances under which the bill is sought to be impeached. The plea of the general issue is forbidden by the new rules to be pleaded in an action on a bill of exchange. And the plea of the special matter, which, according to the new rules, is now to be pleaded, is not to be confined to the effecting the same purpose as a mere notice to prove the consideration. It was intended that the plaintiff should be apprised by the plea of the grounds upon which the defendant objects to the right of recovering upon the bill ; as, for example, that it was given for the accommodation of the plaintiff, the onus of proving which lies on the defendant ; or that it was given upon a consideration which afterwards failed, which in like manner the defendant must prove ; or that it was given on a gambling transaction : and various similar cases may be readily suggested.” It is, therefore, only incumbent on the defendant to allege in his \*plea what he is bound to prove, in order to make [\*450 out a good defence. In *Mills v. Oddy*, 2 C. M. & R. 103,† the plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant gave to the plaintiff as a deposit a check for 100*l*. There being a wilful misrepresentation in the description of the premises, the defendant refused to pay the check, upon which the plaintiff brought an action against him on the check. The defendant having pleaded that there was no consideration for making the check,—it was held, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have been bad on special demurrer. Parke, B., there says : “In framing the plea of want of consideration in actions upon bills and notes, the new rules upon that subject have not been rightly understood. The question is, whether it was not the object of those rules not to compel the defendant to plead *negatively* the want of consideration, but *affirmatively* to set forth the facts from which the want of consideration would appear. Thus, in the present case, the plea might have stated the facts which showed that there was no sufficient consideration to support the action, viz., that there had been a wilful misrepresentation on the part of the plaintiff upon the sale of the property in respect of which the check in question was given. The judges, in framing the rules, never contemplated the adoption of a general plea of want of consideration.

The intention was, that the facts under which the bill or note was given should be specially stated as the ground of defence." [MAULE, J.—According to your argument, you might amend your plea by striking out all the negatives. I think, and the rest of the court seem to think so too, that you had better amend, by distinctly denying that there was any consideration other than that alleged.] Rule accordingly.

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\*DOE d. LAUNDY v. ROE. June 5.

Service of declaration and notice in ejectment upon the attorney of the tenant,—the premises being abandoned.

HAWKINS moved for judgment against the casual ejector,—upon an affidavit stating that the premises were shut up and abandoned, that a copy of the declaration and notice was, on the 15th of May last, affixed on the outer door thereof, another copy served upon the daughter of the tenant at his last known place of abode, a copy upon a house-agent employed by the tenant to let the premises, and a copy upon Messrs. Bicknell, the tenant's attorneys. [JERVIS, C. J.—Why not proceed as upon a vacant possession?] It appears from another affidavit that an action of debt having been brought by the lessor of the plaintiff in this action against the tenant, the attorneys for the latter, on the 26th of May last, took out a summons to stay that action; that an order was thereupon made, by consent, in the following terms:—*Laundy v. Kennett*. Upon hearing the attorneys or agents on both sides, and by consent, I order, that, upon payment of 64*l.* 13*s.* 9*d.*, the debt due from the defendant to the plaintiff, for which this action is brought, together with 13*l.* 2*s.* 8*d.*, agreed costs in this action and in the action of ejectment, on the 2d of June, 1852, all further proceedings in this cause and in the said action of ejectment be stayed: And I further order, that, in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment, registering, and execution, sheriff's poundage, officer's fees, and all other incidental expenses, whether by *fi. fa.* or *ca. sa.*; and *the lessor of the plaintiff to be at liberty to proceed with the action of ejectment*;" that this order was drawn up by Messrs. Bicknell, and by them transmitted to the plaintiff's attorney on the 26th of May; that \*452] default \*was made; and that neither the 64*l.* 13*s.* 9*d.*, nor the 13*l.* 2*s.* 8*d.*, had been paid. [JERVIS, C. J.—That seems to be a sufficient authority to go on, without any consent of the court.] It was necessary to move for judgment against the casual ejector.

JERVIS, C. J.—The tenant is taking a step as if he had appeared  
You may take a rule. Rule absolute.

DRINKWATER v. MILLS. *June 9.*

The court refused to grant a *distringas* to compel the defendant's appearance, upon an affidavit four days old.

BOWLER, on the 9th of June, moved for a *distringas* to compel the appearance of the defendant to a writ of summons, upon an affidavit, regular in all other respects, but sworn on the 5th. He referred to *Waugh v. Pry*, 7 Dowl. P. C. 376, where it was held, that, in moving for a *distringas*, it is no objection to the affidavit of the non-appearance of the defendant, that the search was made *four days* before the affidavit was sworn, provided the time for entering an appearance had expired before the search.

JERVIS, C. J.—I think the affidavit is too stale: it will be safer to make another search, and move again.

The application was renewed on a subsequent day, and

Granted.(a)

(a) See *M'Claine v. Abrahams*, 3 Scott, N. R. 474, 3 M. & G. 113 (E. C. L. R. vol. 42).

\*BLACKMAN v. ASPLIN. *June 9.*

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Upon a motion for judgment as in case of a nonsuit, it is enough if the affidavit shows a default, without going on to negative that the plaintiff has *since* proceeded to trial: that fact should come from the other side.

MANISTY, on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit, upon an affidavit which stated, "that issue was joined in this cause on the 30th of October, 1851, and notice of trial given on the part of the above-named plaintiff for the first sitting in Michaelmas Term in the year aforesaid, as appears by the issue in this cause; and that notice of trial was again given on the part of the above-named plaintiff, for the first sitting in Hilary Term, 1852; and that the plaintiff did not proceed to the trial of this cause in pursuance of either of his said notices."

*Prentice* showed cause.—*Edgar v. Halliday*, 1 L. M. & P. 367, is precisely in point. There, an affidavit sworn in Easter Term, in support of a rule for judgment as in case of a nonsuit, stated that "notice of trial" was given for the sittings after Michaelmas Term, and that the plaintiff did not proceed to trial *in pursuance of his said notice*: and it was held that the affidavit was insufficient, as the cause might have been tried, although not in pursuance of the said notice, in the interval between the alleged default and the motion for the rule. "If this application," said Wilde, C. J., "had been made at a time when the interval between the default and the application would not have

allowed the plaintiff to go to trial,—and the court, taking judicial notice of its practice, can see whether the interval would have allowed this or not,—the affidavit might have been sufficient. But, when a party comes to the court at a distant time, when the interval between the alleged \*454] default and the \*application for judgment as in case of a nonsuit is so great that the plaintiff had ample opportunity of going to trial, I think that the defendant ought clearly to negative the plaintiff's having done so; and, as his affidavit does not do so, I think it is insufficient, and that this rule must be discharged." And Talfourd, J., concurred. [JERVIS, C. J.—In *Jacobs v. Joel*, (a) on the last day of last term, we thought the statement should come from the plaintiff. TALFOURD, J.—We expressly overruled *Edgar v. Halliday*.]

MAULE, J.—*Edgar v. Halliday* was a decision by two judges only; and one of them has since repented of it.

The rest of the court concurring,

Rule discharged on a peremptory undertaking.(b)

(a) In *Jacobs v. Joel*, *Seymour* had obtained a rule for judgment as in case of a nonsuit, upon an affidavit similar to that in the principal case: *Hawkins* showed cause, relying upon *Edgar v. Halliday*. JERVIS, C. J.—That case certainly is expressly in point: but I think the decision was wrong. The defendant comes on the ground of a specific default: the plaintiff cannot say that he has not been guilty of that default. TALFOURD, J.—I confess I also think the decision in *Edgar v. Halliday* was wrong. And the rule was discharged on a peremptory undertaking.

(b) And see *Driscoll v. Whalley*, 16 Jurist, 150, where the Court of Queen's Bench, in Hilary Term last, dissented from *Edgar v. Halliday*; Lord Campbell saying,—“I am of opinion that the affidavit is sufficient to call upon the plaintiff to convince the court that he has gone to trial.”

#### \*455] \*MINCHINER v. MARTIN. June 12.

Upon a motion to set aside a step in a cause, on the ground that a term's notice of proceeding was necessary,—the affidavit must distinctly allege that a term's notice has not been given: it is not enough to state “that no step or proceeding in the cause” has been taken.

*Quære*, whether a term's notice is necessary, where the plaintiff's proceedings have been suspended by an order for security for costs?

*Semble*, that no notice would be necessary in such a case, if security were given.

THIS was an action by the payee against the maker of a promissory note. On the 19th of May, 1848, the defendant obtained an order to stay the proceedings until the plaintiff, who was then resident in Ireland, gave security for costs,—the defendant to have four days' time to plead after such security should be given. On the 5th of April, 1852, the plaintiff obtained an order to change his attorney; and, on the 2d of June, an order was made by Williams, J., to rescind the order for security for costs, upon an affidavit that the plaintiff was then permanently residing and carrying on his business in England.

*Seymour*, on a former day in this term, moved for a rule calling upon the plaintiff to show cause why the order of Williams, J., of the 2d of June last, should not be set aside, on the ground that the defend-

ant was entitled to a term's notice of the plaintiff's intention to proceed. The affidavit upon which the motion was founded, merely stated, "that the plaintiff did not give any security for costs, and that no step or proceeding in this cause was taken after the said 19th of May, 1848, until the end of May, 1852, when the defendant was served with the order of the 5th of April, for changing the plaintiff's attorney; and that no other proceeding in this cause was taken until the 1st of June instant, when the defendant was served with a summons to show cause why the order for security for costs should not be rescinded." [JERVIS, C. J.—Is the order in question a step in the cause,—a step towards judgment? The cases \*collected in Archbold, 132, 333, show that the rule does not apply to collateral proceedings. CRESSWELL, J.—Might not the plaintiff *give* security without a term's notice?] [456] The nearest case to the present is *Lord v. Wardle*, 3 C. B. 295 (E. C. L. R. vol. 54), where it was held, that, where a rule has been made absolute to set aside a verdict found for the defendant, and for a new trial, on payment of costs by the plaintiff, and the plaintiff for more than a year fails to pay the costs, or to take any step towards availing himself of the rule, the defendant cannot move to discharge it, without previously giving a term's notice of his intention so to do. [MAULE, J.—The rule hardly applies, where the plaintiff is disabled from proceeding by an order to give security. JERVIS, C. J.—In *Evans v. Davis*, 3 Dowl. P. C. 786, it was held that the rule does not apply where the delay has taken place at the request of the defendant. So, in the case of an injunction,—*Bosworth v. Philips*, 2 W. Bl. 784, where "the court thought the rule only extended to voluntary delay by the plaintiff himself, and that, where the defendant stays him by an injunction, that is in its nature an exception out of the rule; and *Nares, J.*, cited *Michell v. Cue*, 2 Burr. 660." It is reasonable that a term's notice should not be required where the delay is by the defendant's own act or consent, because in that case he knows why the plaintiff does not proceed, and has no reason to expect him to proceed. So, here, the defendant knows that the plaintiff is prevented from proceeding until security is given for costs. If security were given a term's notice clearly would not be necessary. CRESSWELL, J.—In *Doe d. Vernon v. Roe*, 7 Ad. & E. 14 (E. C. L. R. vol. 34), 2 N. & P. 237, a declaration in ejectment was served, and a rule obtained for judgment against the casual ejector, unless the tenant should appear and plead: the tenant did not appear, but a judge's order was obtained for the delivery of particulars to the \*defendant, and a like order, by consent, that the defendant should have ten days to plead after [457] delivery of the particulars: the lessor of the plaintiff took no step for a year; he then delivered particulars, and, after the expiration of ten days, signed judgment against the casual ejector: and it was held, that, after the year, the lessor of the plaintiff might proceed, without giving



a term's notice, though the tenant had not appeared. By analogy to that case, the plaintiff here might have given security for costs at any time, without giving a term's notice, and might also apply to rescind the order for security; though he could not take any other step.]

A rule nisi having been granted,

*Byles*, Serjt., contra, objected that there was no positive statement in the affidavit upon which the rule was moved, that a term's notice had not been duly given.

*Seymour* endeavoured to show that the statements in the affidavit necessarily amounted to such an allegation. But,

*Per Curiam*.—The affidavit is clearly defective in the particular pointed out; and therefore the rule must be

Discharged, with costs.

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\*458] **\*ANN DALTON v. The MIDLAND Railway Company.**  
*June 12.*

An action having been brought by A. against a railway company, to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A.,—Held, that the company were not entitled to relief under the interpleader act, 1 & 2 Vict. c. 58, s. 1.

THIS was an action of debt brought by the plaintiff to recover from the defendants the sum of 10*l.*, for dividends alleged to be due to the plaintiff on 400*l.* consolidated stock of the Midland Railway Company, of which the plaintiff claimed to be proprietor.

The stock in question having been transferred to, and registered in the books of the company in the name of, one Estlin, by means, as was alleged, of a forged assignment, and Estlin claiming to be the proprietor thereof,

*Bovill*, on a former day in this term, obtained a rule calling upon the plaintiff and the claimant to show cause why the proceedings in this action should not be stayed, and an issue directed between them.

The affidavit upon which the motion was founded,—that of the secretary of the company,—stated, that the plaintiff became the proprietor of the sum of 400*l.* consolidated stock of the said Midland Railway Company, by virtue of a transfer thereof to her from one Dora Delisser, dated the 30th of April, 1850; that, on the 6th of June, 1850, the deponent received the said transfer from one Mitchell, a stock-broker, to be registered in the books of the company, and that the same was on that day duly registered, and two coupons or certificates for the same stock, each for 200*l.*, in the name of "Ann Dalton, of 42 Tufton Street, Westminster, widow," were sent by the deponent to Mitchell, on the 11th of June, 1850; that, on the 30th of August,

*117 Pa. 561*

1850, the deponent received for registration in the books of the \*said Midland Railway Company the deed of transfer of the said [\*459 sum of 400*l.* consolidated stock, purporting to be signed by the said Ann Dalton, and to be witnessed by Mitchell, and to which last-mentioned deed of transfer the two coupons or certificates of stock so as aforesaid sent by the deponent to Mitchell on the said 11th of June, 1850, were annexed; that the deponent did, on the said 30th of August, 1850, duly register the said deed of transfer to John Bishop Estlin, the person named therein as transferee, and did, on or about the 14th of September, 1850, send Estlin a certificate of proprietorship of the said 400*l.* stock in the name of him, Estlin; that, on the 4th of October, 1850, the deponent received a letter, as follows:—"43, Tufton Street, Westminster. I have very great reason to suspect that a forgery has, or may be, committed in the name of Ann Dalton, a shareholder in your line; so that I would advise the company to be on their guard. ANN DALTON. P. S.—Have the goodness to send an answer by return of post, whether the stock is all right or not,"—to which letter the deponent replied, as follows:—"Madam,—In reply to your note received this morning, there is not any Midland stock now registered in your name; the 400*l.* stock which you formerly held, having been transferred. I have compared your signature to the transfer on the purchase of the stock, with the transfer on selling it; and both signatures appear to be the same handwriting." That, on the 6th of October, 1850, the deponent received another letter from the plaintiff, dated the 5th, as follows:—"I have to inform you that I have signed but one paper, and that was the transfer on the purchase of the stock; therefore, that on the transfer of the selling must be a forgery, committed, I have no doubt, by Mitchell, who bought in the shares for me: and I wish to know what proceedings the company intend to take. The undersigned is \*the signature [\*460 of Ann Dalton. I have also to state that I still hold your certificate, stating that [a transfer of] 400*l.* stock has been deposited in your office, and duly registered,"—to which the deponent replied on the 9th: "In reply to your letter of the 5th instant, I beg to inform you that the transfer of the stock from you appearing to bear your signature, and being attested by the same person who had acted as your agent in the purchase of the stock, the company could have no reason to suppose it was any other than genuine; and, if it is not so, they cannot be responsible for it. It rests with yourself to take such steps against Mitchell as you may be advised; and the company will, of course, be happy to render you any assistance in their power, by the production of the transfers, and the evidence of their officers, when required:" That Estlin has, by his agent, at different times before the commencement of this action, claimed the said 400*l.* consolidated stock of the Midland Railway, as his property, and has demanded the said dividends warrants to be delivered to him; that, in consequence of the said claims and dispute, the deponent

does not know to whom the said stock, and the dividends accrued due thereon, belong, or to whom the defendants are liable for the same; that this action was commenced on the 25th of January last; that the declaration was delivered on the 24th of May, and that the defendants have not pleaded thereto; that the company do not claim any interest whatever in the dividends or the subject-matter of this action; that the right to the said dividends and subject-matter of this action, at the time of the commencement thereof, was and is claimed by Estlin, who the deponent expects will sue for the same, inasmuch as his attorney on the 20th of November last wrote to the defendants' attorneys, as follows,—“In respect to Mr. Estlin's claim, I can only say the company have acknowledged him as the holder, and must sooner or later \*hand him the  
\*461] dividends. They have clearly made themselves liable, in allowing the transfer to pass in the first instance; and cannot well deny their responsibility. I shall feel obliged by your informing me, at your earliest convenience, whether you will accept service on behalf of the company, when proceedings are commenced for the recovery of the stock.” The affidavit negatived collusion, and alleged that the defendants were ready to bring into court, or dispose of the subject-matter of the action, as the court might direct.

*Wordsworth*, for the plaintiff, now showed cause.—The question here, is, whether a party who has entered into a contract can avoid the legal consequences of it by calling in aid the interpleader act, 1 & 2 W. 4, c. 58. The recital clearly shows that the statute was intended solely for the relief of those who stand in the position of stakeholders,—“whereas, it often happens that a person sued at law for the recovery of money or goods, *wherein he has no interest*, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay.” In *James v. Pritchard*, 7 M. & W. 216,† the defendant having bought a rick of hay from the plaintiff (who was the executor de son tort of one M. S.), before payment of the price received a notice from a third party, stating that *he* was administrator of M. S., and demanding payment of the sum for which it had been sold: the defendant being subsequently sued by the plaintiff for the price of the hay,—it was held that he was not entitled to relief under the interpleader act. So, in *Patorni v. Campbell*, 12 M. & W. 277,† it was held that a party cannot obtain relief under the interpleader act, where he has incurred a personal  
\*462] liability to either of the contending parties. \*Rolfé, B., referring to *Crawshay v. Thornton*, 2 Mylne & K. 1, there says: “There was a case before Lord Chancellor Cottenham, in which this question was fully entered into, and it was held, that, if a plaintiff in an interpleader suit has incurred to one of the defendants a personal obligation, independently of the question between the defendants themselves, he

cannot compel them to interplead." Again, in *Turner v. The Mayor, &c. of Kendal*, 13 M. & W. 171,† the Court of Exchequer inclined to think, that, where work is done under a contract, and an action is brought for the amount of it by one party, but another claims to be entitled to be paid for it, and gives notice thereof to the defendant, such a case is not within the interpleader act; for, it is the fault of the defendant who made the contract, that he does not know with whom he contracted. So, here, if the defendants have ignorantly or negligently contracted with two persons, they must abide the consequences, and not seek to throw the burthen upon persons who have been guilty of no default. [MAULE, J.—I think it is impossible to say that the defendants have no interest here.]

*Gray*, who appeared for the claimant, submitted, that, even if the transfer *were* forged, the company were estopped by their own act, the registration, from questioning his title. [JERVIS, C. J.—It certainly would be hard to deprive you of that point, by compelling you to interplead with the plaintiff.]

*Bovill*, in support of his rule.—[MAULE, J.—The company are seeking to set up, in answer to an action upon a contract, another contract which they have entered into with a third person.] It is a fallacy to call this a contract. The registration of the deed of transfer is the mere ministerial act of the secretary. [MAULE, J.—If the transfer was not forged, you may be right: if it *is* forged, you are wrong. How can you make two persons \*interplead, for the purpose of inquiring [\*463 into your wrongful act?] The question depends upon the real ownership of the stock. [MAULE, J.—Suppose the Bank of England transfers stock under a forged power to a bona fide holder,—would that be a case for interpleader?] Probably not.

JERVIS, C. J.—There clearly is no pretence for this rule. It was a bold experiment. The rule must be discharged.

The rest of the court concurring,

Rule discharged with costs.

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### SOLOMON v. HOWARD. *June 2.*

The defendant, a master-mariner, having gone abroad, in the course of his business, after the commencement of the action, and after time obtained to plead, but before issue joined,—the court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence.

*Scoble*, that the examination of a party to the suit, under a commission, is receivable in evidence, under the 14 & 15 Vict. c. 99, s. 2.

THIS was an action upon a bill of exchange for 295*l.* 17*s.*, drawn by the plaintiff upon and accepted by the defendant, dated the 12th of September, 1851, and payable six months after date.

The bill in question was drawn for the price of certain goods which had been sold by the plaintiff to the defendant, who was a master-mariner trading between Liverpool and Shanghae, in China, subject to the following agreement, which was written at the foot of the invoice:—"Any of the above goods that cannot be sold at the invoice price, we (the plaintiff) guaranty to take back again. I. SOLOMON."

The writ of summons was served upon the defendant on the 24th of March last. After three summonses for \*time to plead, upon \*464] the usual terms, the defendant, on the 22d of April, pleaded non accepit; and afterwards obtained leave to amend by paying 52l. into court, and pleading a plea of partial failure of consideration as to the rest.(a)

(a) The plea was as follows: As to the first count of the declaration,—except as to the sum of 51l. 6s., parcel of the sum of money therein mentioned, that on the 12th of March, 1851, a certain ship called the *Panic* being then about to sail from the port of Liverpool, in the county of Lancaster, on a voyage to certain parts beyond the seas, to wit, the empire of China, and thence back to the said port, it was mutually agreed by and between the plaintiff and the defendant, that the plaintiff should deliver to the defendant, who should receive from the plaintiff, as on a sale on credit, to wit, a credit of twelve months, at certain prices respectively stated in a certain invoice then made out by the plaintiff, certain goods in the said invoice mentioned, and then intended to be conveyed on board the said ship to the said parts beyond the seas, for the purpose of being sold there by the defendant: and that any of the said goods which could not be sold there at the prices in respect thereof respectively in the said invoice stated, should be taken back again by the plaintiff, to wit, on the return of the said ship from the said voyage, and the defendant should not pay for the goods which could not be so sold; and that, for the securing to the plaintiff the prices, according to the said invoice, of the said goods, amounting to the sum of 295l. 17s., if and so far as the same goods could be sold in the said parts beyond the seas, at the said prices, and, subject to deduction and allowance in amount in respect of the said prices of such of the said goods as could not be sold in the said parts beyond the seas at the said prices, the defendant should accept a bill of exchange to be drawn on him by the plaintiff for the said sum of 295l. 17s., payable six months after date; and that, if, when the same bill became due and payable according to the tenor and effect thereof, the plaintiff and the defendant had not otherwise mutually agreed and arranged, the defendant should, in lieu and substitution of the same bill, and as a renewal thereof, and for the like purpose, and subject as aforesaid, accept another bill of exchange to be drawn by the plaintiff for the like sum, payable six months after date thereof, and deliver the same to the plaintiff in exchange for the said first-mentioned bill: that the said agreement being so made as aforesaid, and in pursuance thereof, to wit, on the day and year last aforesaid, the plaintiff delivered to the defendant, who then received from the plaintiff as on a sale on credit, to wit, a credit of twelve months, at the prices respectively stated in the said invoice, the said goods in the said invoice mentioned; and the same goods then were conveyed on board the said ship to the said parts beyond the seas for the purpose of being sold there by the defendant; and, for the securing to the plaintiff the prices according to the said invoice of the said goods, to wit, the sum of 295l. 17s., if and so far as the same goods could be sold in the said parts beyond the seas at the said prices, and subject to deduction and allowance in respect of the said prices of such of the said goods as could not be sold at the said prices in the said parts beyond the seas, the defendant then accepted a certain bill of exchange bearing date on the day and year last aforesaid, drawn on him by the plaintiff for the said sum of 295l. 17s., payable six months after the date thereof: that, when the same bill became due and payable according to the tenor and effect thereof, to wit, on the 12th of September, 1851, the plaintiff and the defendant not having then otherwise mutually agreed or arranged, the defendant, in lieu and substitution of the same bill, and as a renewal thereof, and for the like purpose, and subject as aforesaid, accepted the said bill of exchange in the first count mentioned, and then delivered the same bill to the plaintiff, in exchange for the said first-mentioned bill: that part only of the goods in the said invoice mentioned, and so delivered, received, and conveyed as aforesaid, to wit, goods whereof the prices respectively mentioned in the said invoice amounted to the said sum of 51l. 6s., could be or were sold at the said invoice prices respectively, in the said parts beyond the seas; and that none of the residue of the goods in the same invoice mentioned could be or were sold at the prices thereof respectively in the said invoice mentioned;

\*The plaintiff sailed for Shanghai on the 8th of April; and, the cause standing for trial at the sittings in London after this term, [\*465]

\*John Henderson moved for a rule to show cause why the trial should not be postponed until his return, which was expected to be in the month of February next. The affidavits upon which he moved gave a detailed account of the dealings between the plaintiff and the defendant, and stated that the defendant's evidence was essential to make out his defence, and that, beyond the amount paid into court, he had a good defence to the action upon the merits. He stated that the parties had been before Talfourd, J., at chambers, for a commission to take the examination of the defendant at Shanghai, when that learned judge doubted whether an examination of a party under a commission was warranted by the late statute. (a) [JERVIS, C. J.—I do not see why we should go out of the way to defeat the act, by giving such undue weight to the words "on the trial." The clause speaks \*of "depositions." These *must* be taken *before* the trial. It is not necessary, however, to decide the point here.] This application rests upon the undoubted power of the court to postpone a trial, where it appears to be essential to the ends of justice that it should be done. [JERVIS, C. J.—Your only ground for the motion, is, that it did not suit the convenience of the defendant to wait in England till after issue joined.] He was compelled to go, or give up his command. [JERVIS, C. J.—How would it have been, before the late act, if the defendant had taken his witnesses abroad with him?] No doubt in that case, he would be compelled to have recourse to a commission. [\*467]

JERVIS, C. J.—I think there ought to be no rule in this case. The defendant has brought the difficulty upon himself, by withdrawing before issue joined. He must take the consequences.

CRESSWELL, J.—It would be scarcely fair to the plaintiff, to allow a

that thereupon the said residue of the said goods were afterwards, and before the bill in the said first count mentioned became due and payable according to the tenor and effect thereof, to wit, on the 1st of March, 1851, conveyed back to the port of Liverpool aforesaid, on board of the said ship, which then returned to the said port from the said voyage,—whereof the plaintiff, within a reasonable time afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice: that the defendant was ready and willing, and offered to the plaintiff, to pay to him the said sum of 51*l.* 6*s.*, and to deliver to him and allow him to take back the said residue of the said goods, which the plaintiff then wholly refused to do: and that, save as aforesaid, there never was any consideration or value whatsoever for or in respect of his accepting or paying, or for or in respect of the plaintiff's being the holder or entitled to the benefit of, either of the said bills of exchange,—verification. The replication took issue upon the alleged agreement.

(a) The 2d section of the 14 & 15 Vict. c. 99, enacts, that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, *either viva voce, or by deposition* according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

defendant who is under terms to go to trial at a particular time, to obtain a postponement of the trial on grounds which existed and were not disclosed when those terms were entered into.

The rest of the court concurring,

Rule refused.

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\*JOHNSON v. LANSLEY. May 31.

A. and B. jointly made bets with third persons on a horse-race. B. received the money, and gave A. a bill accepted by C. (who was no party to the betting) for his share:—Held, that A. was not precluded by the 8 & 9 Vict. c. 109, s. 18, from suing C. upon the bill. *Semble*, that that statute does not render betting on a horse-race illegal.

ASSUMPSIT on a bill of exchange for 36*l.* 1*s.* 2*d.*, drawn by the defendant upon and accepted by one William Hunt, and endorsed by the defendant to the plaintiff. Account stated.

Pleas,—first, a denial of the endorsement,—secondly, a denial of the promise on the account stated,—thirdly, that, before the making of the bill in the first count mentioned, and *before* the passing of the 8 & 9 Vict. c. 109, certain persons unknown were about to game at horse-racing; that the plaintiff and Hunt betted thereat jointly; that Hunt received certain sums for the common profit of himself and the plaintiff; and that the bill in the first count mentioned was given to secure the plaintiff's share of the winnings.

To the third plea, the plaintiff replied *de injuriâ*.

At the trial, before Jervis, C. J., at the sittings in London after the last term, the defendant proved the third plea, except that the transaction upon which it was founded took place *after* the passing and coming into operation of the 8 & 9 Vict. c. 109.

The learned judge ruled, that, inasmuch as the plea was not a good plea, it must be proved in all its parts; and accordingly he directed a verdict to be entered for the plaintiff.

*Phinn*, on a former day in this term, moved for a rule nisi to enter a verdict for the defendant on the third issue. He submitted, that, though horse-racing is legalized by the 8 & 9 Vict. c. 109, s. 18, betting thereat is illegal; and, consequently, that the bill in question, having

\*469] been given for an illegal consideration, could not be enforced. He referred to the statute 9 Anne, c. 14, and to the case of *Gatty v. Field*, 9 Q. B. 481 (E. C. L. R. vol. 58). [CRESSWELL, J.—There was no betting between the plaintiff and Hunt. All you can say, is, that they were partners in an illegal trade, and that one of them has pocketed all the profits. If the plea is bad in its present form, can you reject any part of it?] That may be doubtful. [JERVIS, C. J.—If the transaction took place *before* the statute 8 & 6 Vict. c. 109, the statute 9 Anne, c. 14, being repealed, the plea is clearly

bad. You seek to reject that allegation, so as to set up the statute of Anne.] No: the defendant seeks to avail himself of the 8 & 9 Vict. c. 109.

A rule nisi having been granted,—leave being reserved to the plaintiff to move for judgment non obstante veredicto on the third issue, if the court should think the rule ought to be made absolute,

*Channell*, Serjt., and *Prideaux*, now showed cause.—The plea in substance alleges, that the plaintiff and Hunt betted in partnership on a horse-race, that Hunt received more than his share, and that the bill declared on was given as security for the excess. The plea alleges that this took place *before*, and the evidence shows that it was *after*, the passing of the 8 & 9 Vict. c. 109. This is not the mere statement of a day under a videlicet. If the plaintiff had demurred to the plea, the case must have been argued on the footing of the law as it existed previously to the passing of the 8 & 9 Vict. c. 109. The allegation, therefore, is not an immaterial one: but the question is, whether a defendant who puts an allegation into his plea which may better his position, and prejudice that of his opponent, may afterwards turn round and treat it as immaterial. [JERVIS, C. J.—Suppose the plea good under either law?] In that case, no doubt, the allegation would be an \*immaterial one. [MAULE, J.—It is a common thing to aver [\*470 notice in a declaration or a plea; where it cannot be proved, it may be treated as immaterial, though it *might* be for the benefit of the party pleading.] The plea is evidently framed for the purpose of enabling the defendant to take advantage of the statute 9 Anne, c. 14. The 15th section of the 8 & 9 Vict. c. 109, repeals that act; and s. 18 enacts, “that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.” This is clearly not a case within that section: the betting was not between these parties. [JERVIS, C. J.—The argument on the other side, is, that *the original transaction* is within the statute, and that you cannot collaterally enforce it.] It is conceded that the race was legal; but it is said that bets upon legal races are rendered illegal by the 18th section. [*Phinn*.—In conjunction with the preamble, which shows that it is contrary to the policy of the act. MAULE, J.—The plaintiff and Hunt have been jointly concerned in some void contracts (assuming that they are void), and Hunt has received money on account, beyond his



proper share, and this bill was given as security for the excess. I see nothing contrary to the statute in that. It may be that such a security could not be enforced against a loser. But a loser cannot recover back \*471] money which he has \*paid. Surely a duty arises on the part of Hunt to pay over his share to his copartner.]

*Phinn*, in support of his rule.—The court will not lend its aid to enforce a contract the foundation of which is a transaction that is contrary to the policy of the law. [CRESSWELL, J.—I do not quite understand what that means.] It was the ground upon which *The Chevalier D'Eon's case*(a) was decided. [MAULE, J.—No. That case proceeded on the ground that the wager was contrary to public decency.] Prior to the statute 8 & 9 Vict. c. 109, there was a long series of statutes rendering gaming contracts illegal: and the preamble to that statute recites that “the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom.” That shows that the object of the legislature was not to relax the laws. [MAULE, J.—It goes on to repeal any law which would make this transaction illegal, if any such there were.] In *Varney v. Hickman*, 5 C. B. 271 (E. C. L. R. vol. 57),—where it was held that the 8 & 9 Vict. c. 109, s. 18, did not apply to an action where a party seeks to recover back his deposit from a stakeholder, upon a repudiation of the wager,—Maule, J., says: “The first part of that section enacts ‘that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void.’ It then goes on to enact ‘that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager,—or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.’ Now, the first branch of this section \*472] declares the \*contract to be null and void: the second prevents the winner from bringing an action to recover the amount of the bet from the loser: and the third prevents the winner from suing the stakeholder. It certainly is true that the second branch is involved in the first; that is to say, that, if the section had stopped at the end of the first branch, it would have followed that no action could be brought to enforce a contract so declared to be void.” [MAULE, J.—The 18th section means to treat the money which is in a man's pocket at the time, as the reasonable limit to which he may lawfully gamble.] If wagering is illegal, there are many authorities which show that Johnson could not have sued Hunt: and the defendant is in the same position. In *Simpson v. Bliss*, 2 Marsh. 542 (E. C. L. R. vol. 4), 7 Taunt. 246 (E. C. L. R. vol. 2), A. bet an illegal wager of twenty-five guineas with B. on a horse-race, of which C., at his own request, staked ten. A. won, and paid C. ten guineas, in the expectation of

(a) *Da Costa v. Jones*, Cowp. 729.

receiving the whole amount of the bet from B. B. however died, and A. never received it. It was held, that A. could not recover back the ten guineas which he had paid to C., because he could not establish his claim without going into proof of the illegal transaction in which both were equally engaged. [CRESSWELL, J.—Is wagering illegal? Of what law is it a breach?] The preamble and the 18th section, taken together, clearly show it to be illegal.

JERVIS, C. J.—I am of opinion that this rule should be discharged. It is admitted that the transaction occurred *after* the passing of the 8 & 9 Vict. c. 109; therefore, the plea was not strictly proved. This made the allegation a material one. Before the passing of the 8 & 9 Vict. c. 109, there were various statutes relating to betting on horse-races, all of which are repealed by the 15th section of that act. The 17th section imposes certain penalties on persons cheating at \*play, or “in wagering on the event of any game, sport, pastime, [\*473 or exercise.” Then comes s. 18, which enacts, “that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.” There is nothing there to show this transaction illegal. Hunt was bound, upon every principle of justice, to pay this money to Johnson. And the circumstance of Lansley being substituted for Hunt cannot make that illegal, which as between Johnson and Hunt would not have been so.

MAULE, J.—I am of the same opinion. The money which was the consideration for this bill, was money which Hunt was bound to account for to Johnson. The losers could not get it back from Hunt; and it would be a very unjust thing that he should keep the whole. Before the statute 8 & 9 Vict. c. 109, he clearly would have been bound to pay over the money; and I find nothing in that statute to excuse him from doing so. The plaintiff is entitled to retain his verdict.

The rest of the court concurring,

Rule discharged.

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Where one of two joint winners at cards receives the sum won by both from the loser, the other can maintain an action against him for the half received to his use: *Owen v. Davis*, 1 Bailey, 315.

**\*474] \*DOE d. HYDE v. The Mayor, &c., of the Borough of MANCHESTER. June 9.**

A corporation empowered by special acts, which incorporated the 8 & 9 Vict. c. 18, to construct waterworks, and to take certain lands, required lands belonging to A. and B., the boundary between which was improperly described in their plans and books of reference. In consideration of B.'s withdrawing his opposition to their bill in committee, the corporation agreed to settle the value of the land required from, and the compensation due to, A., by arbitration under the above act, and to fix the exact quantity of land, within six months after the passing of the bill. In the proceedings under the reference, the mistake of the boundary was pointed out; but the award fixed a value in terms only for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow strip of land belonging to B., but which the corporation had agreed to purchase from A. as part of his land, and for which they had paid a sum of money to A., and of which they took possession as part of the land purchased from A.

B. brought an ejectment against the corporation for this strip of land, and recovered a verdict (which the corporation unsuccessfully attempted to set aside), and issued and lodged with the sheriff a writ of *habere facias possessionem*.

The corporation having since the judgment in the ejectment perfected their title to the land in question, under the 124th section of the 8 & 9 Vict. c. 18,—The court stayed the proceedings upon the judgment, upon the terms of the corporation paying to the lessor of the plaintiff his "full costs and expenses" of the action, and costs of the application :—

Held, that "full costs and expenses," in the 126th section of the 8 & 9 Vict. c. 18. meant costs "as between attorney and client."

THE corporation of Manchester, in the year 1847, obtained an act of parliament, 10 & 11 Vict. c. cccii., to enable them to construct waterworks. By that act, which was intituled "The Manchester Corporation Water Works Act, 1847," it was enacted that the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), should be incorporated with that act, except so far as inconsistent therewith. By their act, the corporation were empowered to take lands; and, amongst others, they required certain lands belonging respectively to the Duke of Norfolk and Mr. Hyde, the lessor of the plaintiff, the boundary between which was inaccurately described in their plans and books of reference. In consideration of Mr. Hyde's withdrawing his opposition to their bill, in committee, the corporation had agreed to settle the value of the land required from, and the compensation due to, him, by arbitration, pursuant to the  
**\*475]** \*act, and to fix the exact quantity of land to be taken, within six months after the passing of the bill.

In the proceedings before the arbitrator, the mistake as to the boundary was pointed out; but the award fixed a value in terms only for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line, a narrow strip of land belonging to Mr. Hyde, but which the corporation had agreed to purchase from the Duke of Norfolk as part of his land, and for which they paid him.

The lessor of the plaintiff having obtained a verdict in an action of ejectment brought to recover this strip of land, and a rule for a new trial having been refused, the corporation proceeded, within six months,

to acquire the legal ownership thereof under "The Manchester Waterworks Amendment Act, 1848" (11 & 12 Vict. c. ci.), and the 8 & 9 Vict. c. 18, s. 124.

The lessor of the plaintiff having issued a writ of *habere facias possessionem* in this cause, and lodged the same for execution with the sheriff of Cheshire, the defendants, on the 20th of March last, took out a summons calling upon the lessor of the plaintiff to show cause why that writ should not be set aside, or why the execution thereof should not be stayed, on the ground that the writ had been issued and lodged for execution in violation of the 124th section of the Lands Clauses Consolidation Act, 1845, and why the lessor of the plaintiff should not pay the costs of the application. An order was thereupon made by Pollock, C. B., staying the execution of the writ until the fifth day of the following term. Accordingly, on the fourth day of Easter Term last,

Sir *A. Cockburn* obtained a rule calling upon the lessor of the plaintiff to show cause why the writ of *\*habere facias possessionem* should not be set aside, or why the execution of such writ should [\*476 not be stayed for ever; and why the lessor of the plaintiff should not pay to the defendants or their attorney their costs of and occasioned by the said writ, and of this application to the court.

*Bramwell* and *Welsby*, on a subsequent day, showed cause.—The 124th section of the 8 & 9 Vict. c. 18,—“with respect to interests in lands which have by mistake been omitted to be purchased,” enacts, that, “if, at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special act, or any act incorporated therewith, they were authorized to purchase, and which shall be permanently required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in, or charge affecting, such lands, which the promoters of the undertaking shall *through mistake or inadvertence* have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or, in case the same shall be disputed, then *within six months* after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively, in respect thereof, during the interval between the entry of *\*the* promoters of the undertaking thereon, and the time of the payment [\*477

of such purchase-money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this act the same respectively would have been agreed on or awarded and paid, in case the promoters of the undertaking had purchased such estate, right, interest, or charge, before their entering upon such land, or as near thereto as circumstances will admit." And the 125th section provides, that, "in estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profits thereof, the jury, or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest, and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed." [JERVIS, C. J.—What is to happen when the six months have elapsed?] The corporation are trespassers. They have no right at this period to come to stay the plaintiffs' proceedings, upon a ground which would have been an answer to the ejectment: *Doe d. Armistead v. The North Staffordshire Railway Company*, 16 Q. B. 526 (E. C. L. R. vol. 71). Assuming, however, that the corporation had no answer to the action of ejectment, and that they have since obtained a statutable title, still they have no right to ask the court to set aside the writ of possession, which is strictly regular. No doubt, the court has power to stay execution in an action of ejectment, where the title of the lessor of the plaintiff has \*478] expired: *Doe d. Morgan v. Bluck*, 3 Campb. 447:\* but the remedy sought by this rule is wholly inapplicable here.

*Cowling*, in support of his rule.—The three years within which the corporation might exercise the compulsory powers for taking land, given to them by their acts, having expired, they are compelled to fall back upon the 124th section of the 8 & 9 Vict. c. 18. The case clearly falls within that section: the corporation failed to acquire the slip of land in question within the prescribed period, through mistake or inadvertence: see *Hyde v. The Mayor, &c., of Manchester* (before Parker, V. C.), 16 Jurist, 189.

JERVIS, C. J.—I am of opinion that this rule should be made absolute, not in its terms, for it asks too much, but in a modified manner. It would not, I think, be right to set aside the writ, which is perfectly regular, though I think the execution should be stayed. Nor do I think there is any ground for calling upon the lessor of the plaintiff to pay costs. The 126th section of the 8 & 9 Vict. c. 18, contemplates proceedings of which the undertakers are to pay the costs. It enacts, that, "in addition to the said purchase-money, compensation, or satis-

faction, and before the promoters of the undertaking shall become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, they shall, when the right of any such estate, interest, or charge, shall have been disputed by the company, and determined in favour of the party claiming the same, pay *the full costs and expenses* of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place; and such costs and expenses shall, in case the same shall be disputed, be \*settled by the proper officer of the court in which such [\*479 litigation took place." The three years within which the corporation were empowered to take land compulsorily, having elapsed, they must rest upon the 124th section of the act, which gives them six months within which to perfect their right, pay the money, and execute a deed-poll. All the other matters are disposed of by this view of the case. The rule, therefore, will be absolute in the modified manner I before suggested.

CRESSWELL, J.—I am of the same opinion. There is no great difficulty in the construction of the act when the facts are once ascertained.

The rest of the court concurring,

Rule absolute,—“that the writ of *habere facias possessionem*, and all proceedings on the judgment, be respectively stayed; the defendants undertaking to pay to the lessor of the plaintiff, or to his attorney, *his full costs and expenses* of the action, together with his costs of and occasioned by this application.”

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Upon the taxation of the costs under this rule, the master construed the 126th section of the 8 & 9 Vict. c. 18, to mean, by “the full costs and expenses” of the proceedings, liberal costs as between party and party, and not costs as between attorney and client.

*Welaby*, for the lessor of the plaintiff, moved for a review of the taxation. He submitted that the object of the rule was to give the lessor of the plaintiff such \*costs as the 126th section contemplates, [\*480 and that that section contemplates that they shall be such as to be a full and complete indemnity to the party for all that he may have reasonably expended in the litigation,—to place the party in the position he would have been in but for the unlawful acts of the corporation.

The rule was granted, and afterwards made absolute without any opposition.

Rule accordingly.

## BEAVAN v. WALKER. April 28.

A final order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, is no protection against an execution on a judgment in an action of *tort* signed after, upon a verdict obtained before, the making of such final order.

AN action upon the case was brought against the defendant for a false and fraudulent representation made by him upon a sale to the plaintiff of a shop and the good-will of a business, and a verdict was given on the 5th of December, 1851, for the plaintiff, damages 30*l.* 1*s.* 6*d.* On the 12th of December, the plaintiff's attorney delivered his bill of costs to the defendant. On the 17th, the defendant petitioned the court of bankruptcy for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and obtained a final order for his discharge on the 30th of January, 1852. Judgment was signed in the action on the 5th of April, 1852, and the defendant was taken in execution.

*Hawkins*, on a former day in this term, obtained a rule nisi for his discharge from custody, on the ground that the final order released him from the claim. He referred to *Sharpe v. Iffgrave*, 3 B. & P. 394, and *Berry v. Irwin*, 8 C. B. 532 (E. C. L. R. vol. 65).

\*481] *Petersdorff* now showed cause.—The question turns upon the construction of the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. The former statute clearly extends only to cases where the relation of debtor and creditor subsists between the parties. The first section recites that "it is expedient to protect from all process against the person such persons as have become *indebted* without any fraud, or gross or culpable negligence," &c., and enacts that any person not being a trader, or, being a trader, owing less than 300*l.*, on giving certain notices, may present a petition to the court of bankruptcy, stating the *debts* owing to and by him. The fourth section enacts that the commissioner may, if satisfied that the *debts* of the petitioner were not contracted by fraud or breach of trust, &c., make a final order which is to be "for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in the official assignee," &c. And section 10 enacts, "that, if any suit or action is brought against any petitioner for or in respect of any *debt* contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." The 7 & 8 Vict. c. 96, which was passed to amend that act, in s. 3, requires a certain notice to be given to creditors "whose *debts* respectively shall amount to 5*l.*" The 6th section enacts, "that any prisoner in execution upon any judgment obtained in any action for the recovery of any *debt*, either not

being a trader within the meaning of the statutes relating to bankrupts, or, being a trader within the meaning of the said statutes, owing debts amounting on the whole to less than 300*l.*, may be a petitioner for protection from process; and \*every such prisoner to whom an [482 interim order for protection shall have been given, shall not only be protected from process as provided by the said recited act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule," &c. The 22d section enacts "that the final order to be made under the provisions of the said act, as amended by this act, shall protect the person of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned, that is to say, from all process in respect of the several *debts* and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner, to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be endorsees or holders of any negotiable securities set forth in such schedule: Provided always, that every such final order may be made without specifying therein any such debt or debts, or sum or sums of money or claims as aforesaid, or naming therein any such creditor or creditors as aforesaid." That section evidently points to *debts*, or something which must end in a debt, or is susceptible of calculation. The 24th section, like the 4th section of the former act, enables the commissioner to make a final order for protection, if satisfied that the *debts* have been contracted without fraud, &c. The 26th section, which will probably be relied on by the other side, enacts "that the final order for protection from process shall and may extend to all process issuing from any court for any contempt, ecclesiastical or civil, for non-payment of money or of costs or expenses in \*any [483 such court; and that, in such case, such final order shall be deemed to extend also to all costs incurred by such creditor before the filing of the petitioner's schedule in any action or suit brought by such creditor against the petitioner for the recovery of the same; and that all persons as to whose demands for any such costs, money, or expenses as aforesaid, the final order obtained by the petitioner shall be adjudged to extend, shall be deemed and taken to be creditors of such petitioner in respect thereof, and entitled to the benefit of all the provisions made for creditors by the said recited act (5 & 6 Vict. c. 116) or by this act; subject, nevertheless, to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such petitioner's estate and effects." The 35th section of the 1 & 2



Vict. c. 110, shows the marked distinction intended by the legislature to be made between the powers given to the commissioners under the insolvent acts, and those given under these protection statutes: it enacts "that it shall be lawful for any person who shall be in actual custody within the walls of any prison, upon any process whatsoever, for or by reason of any debt, *damages, costs*, sum or sums of money, or for or by reason of any contempt of any court whatsoever for non-payment of any sum or sums of money, or of costs, taxed or untaxed, either ordered to be paid, or to the payment of which such person would be liable in purging such contempt, or in any manner in consequence or by reason of such contempt," to petition the court for relief: and ss. 75, 79, and 80, show that the discharge is equally extensive. Under the bankrupt acts, a *verdict* was not in general provable, though the commissioner in his discretion might allow it to be proved, if the creditor so elected: \*484] the *judgment* was treated as the debt: see *Ex parte Todd*, 3 Wils. \*270; *Ex parte Charles*, 14 East, 197, 16 Ves. 256; *Buss v. Gilbert*, 2 M. & Selw. 70, 2 Rose, B. C. 157.

*Hawkins*, in support of his rule.—The final order obtained by the defendant clearly protects him from *all process* against his person; that is, from all civil process. This question underwent discussion in *Thomas v. Hudson*, 16 M. & W. 885.† There, the plaintiff having obtained judgment against one Foulkes in an action of assault and false imprisonment, sued out thereon a ca. sa., on which Foulkes was taken, and committed to the Queen's prison: Foulkes afterwards petitioned the court of bankruptcy for his discharge under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the keeper of the Queen's prison accordingly. The plaintiff having brought an action against the keeper for an escape,—it was held in the Exchequer Chamber, in affirmance of the judgment of the Court of Exchequer,—14 M. & W. 353,†—that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction. If this was not a "debt due," it was, at all events, a "debt claimed to be due," for, the attorney for the plaintiff had delivered his bill of costs to the defendant. [JERVIS, C. J.—Suppose the plaintiff had delivered a particular of claim,—would that bind him?] It is not the taxation of the costs that constitutes them a debt: *Hurst v. Mead*, 5 T. R. 365. [CRESSWELL, J.—It is the *judgment* that is the debt.] The 26th section of the 7 & 8 Vict. c. 96, speaks of "damages." [WILLIAMS, J.—That is merely to distinguish between debts properly so called, and things which sound in damages. JERVIS, C. J.—I think the 26th section shows \*conclusively that the statutes do not apply to this \*485] case.] It must be conceded that this was not strictly a debt

until judgment signed. But, inasmuch as a bill of costs had been delivered, and the plaintiff had the power at any moment to turn it into a debt, the question is, whether he ought not to be held to have so elected as to entitle the defendant to insert the claim in his schedule. [CRESSWELL, J.—Suppose a *verdict* obtained against the defendant in an action for breach of promise of marriage, seduction, or any of the other offences mentioned in the 24th section of the 7 & 8 Vict. c. 96, could the commissioner make a final order to protect him against that verdict?] The language of that section would seem to apply only to *judgments*.

JERVIS, C. J.—I am of opinion that this rule must be discharged. The question turns upon the construction of two statutes,—the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96. With regard to the former of these statutes, the words seem to me to show plainly that it was intended to apply to *debts*, and to debts only. Indeed, the only argument urged by Mr. Hawkins upon that statute, is founded upon the 4th section, which says that “the order shall be called a final order, and shall be for the protection of the person of the petitioner from *all process*, and for the vesting of his estate and effects in the official assignee.” It is manifest that that section was not meant to have so extensive a meaning as that suggested; but that it was intended that the final order should protect the party from all process which shall have reference to the subject-matters which could under the statute come before the commissioner for adjudication. The 7 & 8 Vict. c. 96, so far as regards the jurisdiction, seems to me to come to the same result. But it is said, that, as the final order section of that statute, s. 22, contains larger words, it must have been intended \*to have a larger operation than the former statute in this respect. By that section, [\*486 the final order is to protect the person of the petitioner “from all process in respect of the several debts and sums of money due, *or claimed to be due*, at the time of filing the petition, from such petitioner, to the several persons named in his schedule as creditors, *or as claiming to be creditors*, for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be endorsees or holders of any negotiable securities set forth in such schedule.” This clearly was not a *debt*. But it is said that it was “a sum of money due or claimed to be due.” So it was, but not due or claimed to be due to the plaintiff as a creditor. No credit was ever given to the defendant either for the judgment or the costs. The 22d section was, I apprehend, only intended to apply to debts or to mercantile claims not finally adjusted and ascertained between the parties, and not to cases like the present. If it were held to apply to a case of this sort, this manifest absurdity would

follow,—as was pointed out by my Brother Cresswell in the course of the argument,—viz. that the insolvent would be protected by the final order from a *verdict* in an action for breach of promise of marriage, seduction, &c., but that the final order would be no protection from a *judgment*, although the verdict does not become a debt until perfected by judgment. This rule being an experiment, must be discharged with costs.

The rest of the court concurring,

Rule discharged, with costs.

\*487]

\*SMITH v. WINTER. May 4.

On a settlement of accounts between the plaintiff and defendant, the plaintiff was found to have been overpaid by 1*l.* 11*s.* 5*d.*, which sum (as the jury found) it was agreed should go to the defendant's credit in their future dealings. This claim, however, was barred by the statute of limitations. The plaintiff afterwards did work for the defendant to the amount of 5*l.* 6*s.* 6*d.*, and brought an action to recover that sum. The defendant paid 4*l.* into court:—Held, that he had a good answer to the balance of 1*l.* 6*s.* 6*d.* under never indebted.

DEBT, for work and labour and materials, and for money found due upon an account stated.

Pleas,—first, except as to 4*l.*, never indebted,—secondly, except as to the same sum, payment,—thirdly, except as to the same sum, a set-off for work and labour, &c.,—fourthly, as to 4*l.*, payment into court.

Replication to the third plea, except as to 4*l.*, the statute of limitations: rejoinder thereto, merchants' accounts.

The following particulars of demand were delivered:—

"This action is brought to recover the sum of 23*l.* 6*s.* 4*d.*, due as follows:—

"1847, June 28. To balance of account from March 25th, 1847						7	7	10
"204 21ft. 2½ × 9, 16 20ft. 2½ × 9, from Commercial Docks						1	15	0
"13 weeks' standing for two carts and two carriages from March 25th to June 24th, 1847						3	5	0
"Aug. 12. To hire of cart ½ day						0	1	6
"          "          " 1 day						0	2	6
"14.          "          " 1 day						0	2	6
"212 weeks' standing for cart from June 24th, 1847, to July 22, 1851						10	12	0
						<hr/> £23 6 4" <hr/>		

The following amended particulars of the item of 7*l.* 7*s.* 10*d.*, were afterwards delivered:—

\*488] "15th May, 1847. To amount agreed by the defendant to be due at this time to the plaintiff . . . 25 8 5  
 "By bill from the defendant on one W. Dockrell, payable at four months after date, for the sum of . . . 18 0 7

"To balance agreed to be due by the defendant to the plaintiff at this date . . . . . £7 7 10"

The cause was tried before Jervis, C. J., at the sittings in Middlesex after last Hilary Term. The facts which appeared in evidence were as follows:—

In May, 1847, there having been mutual dealings between the plaintiff and defendant, they settled accounts together, when it was agreed that the defendant had overpaid the plaintiff to the extent of 1*l.* 11*s.* 5*d.*, which sum (as the jury found) it was agreed was to be placed to the defendant's credit in their future dealings. This balance was arrived at thus:—The plaintiff's demand against the defendant was 25*l.* 8*s.* 5*d.*; and the defendant had paid him by bill 18*l.* 0*s.* 7*d.*, and had done work for the plaintiff to the amount of 8*l.* 19*s.* 3*d.* more. Subsequently, the plaintiff did work for the defendant to the amount of 5*l.* 6*s.* 6*d.*, which was the sum ultimately sought to be recovered in this action.

For the plaintiff it was insisted that the transaction as to the 1*l.* 11*s.* 5*d.* was not admissible under the plea of payment, and that the set-off was barred by the statute of limitations.

On the part of the defendant, it was submitted that he had a good defence to the action to the extent of 1*l.* 11*s.* 5*d.* either under the plea of payment or set-off, and consequently that the 4*l.* paid into court covered the plaintiff's claim; and the cases of *Inglis v. Haigh*, 8 M. & W. 769,† and *Cottam v. Partridge*, 4 M. & G. 271 (E. C. L. R. vol. 43), \*4 Scott, N. R. 819,(a) were relied on as an answer to the replication to the third plea. [\*489]

A verdict was found for the defendant upon all the issues, with leave to the plaintiff to move to enter a verdict for him on the third issue, for 1*l.* 6*s.* 6*d.*

A rule nisi having been obtained accordingly,

*Byles*, Serjt., and *J. Brown*, showed cause.—The set-off, no doubt, is barred by the statute of limitations, the transactions between the parties not being within the exception as to merchants' accounts. It may be conceded also that the 1*l.* 11*s.* 5*d.* could not be made available for the defendant under the plea of payment: but there was ample evidence of an agreement that that sum should be set against any future

(a) An open account between two tradesmen, for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchants between merchant and merchant," within the exception of the statute of limitations, 21 Jac. 1, c. 16, s. 3.

claim which the plaintiff might have against the defendant; and therefore it afforded a defence pro tanto under not guilty. In *Bussey v. Barnett*, 9 M. & W. 312,† it was held, that, where goods are sold for ready money, and payment is made accordingly, no *debt* arises, and such payment is therefore provable under the general issue. [WILLIAMS, J.—That case went to the very verge of the law.] It has good sense in its favour; for, if there is no interval of time between the delivery of goods and the payment of the price, the buyer never becomes indebted to the seller. *Bussey v. Barnett* has never been overruled, though Patteson, J., doubted the propriety of the decision, in *Littlechild v. Banks*, 7 Q. B. 739 (E. C. L. R. vol. 53). In *Wilson v. Story*, 4 Jurist, 463, it was held, that, in assumpsit by brewers for beer sold to the defendant, who was in their employment, the defendant might \*490] show, under the general \*issue, that the beer was supplied in part payment of his wages. In *Cleworth v. Pickford*, 7 M. & W. 314,† to indebitatus assumpsit for work and labour, and for services in navigating certain barges for the defendants,—the latter pleaded, that the claim was for wages due for services performed by the plaintiff as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that the plaintiff was hired by them under an agreement that, as master of the said boat, he was to be responsible for the safety and due delivery of all goods taken on board by him, and was to be chargeable for all pilferages of, or damages or losses to, any goods under his charge, and that the amount thereof should be deducted from his wages, and might be pleaded or set off accordingly: the plea then averred the delivery of a pipe of wine to the plaintiff on board the boat, and that, whilst it was so in the plaintiff's charge, the wine was pilfered, and water substituted in lieu thereof, whereby the pipe of wine was greatly damaged, for which damage the defendants were liable, and which damage amounted to a certain sum, &c., which far exceeded the amount of the causes of action in the declaration mentioned; the defendants then claimed to set off the loss they had thereby sustained against the plaintiff's demand; and an opinion was intimated by the court that the plea amounted to the general issue. So, in *Bamford v. Harris*, 1 Stark. N. P. C. 343 (E. C. L. R. vol. 2), where, by the custom of the hat trade, the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, it was held that the defendant is entitled to such deductions, in an action brought by the dyer, without giving any notice of set-off, and although there has not been any previous adjustment of the amount of the damage. In *Chitty on Pleading*, 7th edit., p. 357, it is said: "In \*491] general, these (the common) counts cannot be supported, \*where the plaintiff was to be paid for his goods, not in money, but by the delivery of other goods,—*Barbe v. Parker*, 1 H. Blac. 283; *Talver v. West*, Holt, N. P. C. 178; *Read v. Hutchinson*, 3 Campb. 352: see

also *Collingbourne v. Mantell*, 5 M. & W. 289.† But, if the contract be for payment partly in money and partly in goods, and the latter are delivered, and the plaintiff seek to recover the money only, he may declare on the common counts for goods sold,"—*Sheldon v. Cox*, 3 B. & C. 420 (E. C. L. R. vol. 10), 5 D. & R. 277 (E. C. L. R. vol. 16); *Bull v. Parker*, 2 Dowl. N. S. 345. Applying that doctrine to the present case, the plaintiff can only recover under the common count the balance due to him after deducting the 1*l.* 11*s.* 5*d.* which he was overpaid on the settlement of the account in May, 1847, and as to which there was evidence of a special agreement; and the payment into court covers that balance.

*Miller*, Serjt., in support of his rule.—It is now conceded that the pleas of payment and set-off cannot avail the defendant. Payment, whether it be prepayment or a payment after a debt due, can only be made available under a plea of payment. In *Sinclair v. Baggaley*, 4 M. & W. 312,† a written paper containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previously to the bankruptcy, showing a balance due to the creditor, was held to be evidence of *payment*, and not of set-off, and admissible only under a plea properly framed. The question whether the 1*l.* 11*s.* 5*d.* was agreed to be taken as a prepayment, was not left to the jury.

JERVIS, C. J.—I am of opinion that this rule must be discharged. It calls upon the defendant to show cause why a verdict should not be entered for the plaintiff for 1*l.* 6*s.* 6*d.* To see whether or not the plaintiff is \*entitled to this, we must look at the record, and at the finding of the jury. The result of the admissions made on the [\*492 argument may show that the plaintiff was entitled to have a verdict found for him on the plea of set-off,—the statute of limitations being an answer as to that, and not being displaced by the replication, these not being merchants' accounts. My Brother Byles was bound to admit also that the facts given in evidence as to the balance of 1*l.* 11*s.* 5*d.*, were not available under the plea of payment. The only question is, whether the defendant established a good defence under the plea of never indebted. The finding of the jury amounts to this,—that, in May, 1847, it was agreed between the plaintiff and the defendant, that, to the extent of the balance then ascertained to be due to the latter, of 1*l.* 11*s.* 5*d.*, the former was not to be paid for work thereafter to be done by him for the defendant. The plaintiff cannot under the common count enforce payment for that work; and therefore the defendant had a good defence as to that under the general issue. The rule must be discharged.

CRESSWELL, J.—I am of the same opinion. The original demand of the plaintiff may be taken to have been 5*l.* 6*s.* 6*d.* The defendant has paid 4*l.* into court, leaving a balance of 1*l.* 6*s.* 6*d.* The way in which the defendant meets that, is this:—On the settlement of a former account between the parties, there was a balance in the defendant's favour of 1*l.*

11s. 5d., which it was agreed should be settled in the next account,—that is, that the 11s. 5d. should be treated as a prepayment to that extent. This, therefore, was an answer to the plaintiff's claim beyond the sum paid into court, under never indebted.

The rest of the court concurring,

Rule discharged.

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**\*493] \*BELL, One of the Public Officers of THE NATIONAL PROVINCIAL BANK OF ENGLAND, v. FISK. May 1.**

Upon a motion to enter up judgment on an old warrant of attorney, the affidavit is properly introduced in the cause in which the judgment is to be entered.

Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the copartnership, the judgment thereon is properly entered up in the name of the public officer for the time being.

THE defendant, who had kept an account with The National Provincial Bank of England, at their branch bank at Ipswich, on the 4th of October, 1837, executed to John Melville, William Henry Sharpe (since deceased), and James Ruddell Todd, three of the trustees of the bank, a bond bearing date on that day, in the penal sum of 1400*l.*, with a condition thereunder written, whereby, after reciting that the said J. Melville, W. H. Sharpe, and J. R. Todd, were three of the trustees of the society or copartnership called the National Provincial Bank of England, and that the defendant had opened an account with the said society or copartnership at their said branch at Ipswich, and that the sum of 700*l.* and upwards was then due on the said banking account from the defendant to the said society or copartnership,—it was conditioned, that, if the defendant, his heirs, executors, and administrators, should and did from time to time and at all times thereafter, on demand made thereof by the court of directors of the said society or copartnership, or by the manager for the time being of the said branch bank of the said society or copartnership at Ipswich aforesaid, or any other officer or clerk of the said society or copartnership thereunto authorized, well and truly pay or cause to be paid unto the said society or copartnership the said sum of 700*l.* so then due from the defendant to the said society or copartnership as aforesaid, and all and every such sum and sums of money which upon any balance of accounts between the

**\*494] said society or \*copartnership, and the said defendant, his ex-**  
 cutors or administrators, should from time to time become and be due and owing to the said society or copartnership from the defendant, his executors, or administrators, by reason or on account of any future advances and otherwise, as in the said condition more particularly mentioned, together with interest at 5 per cent. per annum on the amount of the balance, the payment of which should for the time being:

be demanded, so nevertheless that all moneys to be ultimately recovered on the said bond, and intended to be secured thereby, should be and was thereby limited not to exceed the sum of 700*l*.

The defendant also, on the same day, executed a warrant of attorney authorizing a judgment to be entered up against him in an action of debt upon "the said bond or obligation so made and entered into by the said defendant to the said John Melville, William Henry Sharpe, and James Ruddell Todd, three of the trustees of the said society or copartnership, or the survivors or survivor of them, their or his executors or administrators, in the penal sum of 1400*l*. aforesaid," &c., with a defeasance thereon endorsed, "whereby it was declared and agreed that the judgment intended to be entered up under the authority of the said warrant of attorney, should extend and enure to cover any sum or sums of money which should for the time being constitute the balance due from the defendant to the said society or copartnership, so nevertheless that no greater sum should be ultimately recovered by means of the security than the sum of 700*l*., and that no execution should be issued upon or by virtue of the judgment to be entered up on the authority of the said warrant of attorney, unless default should be made in payment of such balance as aforesaid when the same should be demanded: but, in case such default should be made, such execution as aforesaid should issue, and that without suing out or executing any writ of scire *\*facias*, or doing any other act for renewing the said judgment, notwithstanding that no process should be had or taken thereon for a year previously to the issuing such execution, or the said Robert Fisk should be then dead."

Upon an affidavit stating that 788*l*. 11*s*. 8*d*. was on the 15th of October last justly due and owing from the said Robert Fisk to the said National Provincial Bank of England, upon the balance of his banking account with the company, secured to the extent of 700*l*. by the said bond or warrant of attorney, and still remained due; that payment of the amount, with interest, had been duly demanded, but was not paid; that the defendant was alive on the 27th of January then instant; that the warrant of attorney was duly executed by the defendant; and that the plaintiff Robert Bell was one of the duly registered public officers of The National Provincial Bank of England, and as such was duly empowered to sue for and on behalf of the said society or copartnership,

*Byles*, Serjt., on the 28th of January last, obtained a rule nisi to enter up judgment against the defendant on the warrant of attorney.

*G. Hayes*, for the defendant, objected that the affidavit upon which the rule was obtained was improperly intituled,—“Between Robert Bell, one of the registered public officers for the time being of and for certain persons united in copartnership for the purpose of carrying on, and carrying on, the trade and business of bankers in England, in and by the name, style, firm, and title of The National Provincial Bank of



England, plaintiff, and Robert Fisk, defendant,"—there being no such cause in court. He submitted that the affidavit should have been intituled "In the matter of so and so," like those on a motion for a certiorari,—*Ex parte Nohro*, \*1 B. & C. 267 (E. C. L. R. vol. 8). *Ex* \*496] *parte Gregory*, 8 B. & C. 409 (E. C. L. R. vol. 15), shows that that is the proper mode of intituling affidavits upon a motion of this sort.

JERVIS, C. J.—When you obtain leave, the writ issues, and all is done *uno flatu*. *Sowerby v. Woodroff*, 1 B. & Ald. 567, settles the point: there, the affidavit upon a motion like this was held to be properly intituled in a cause,—“for,” said the court, “the warrant of attorney must be taken as an admission of a suit pending in the court, on which judgment is to be entered up.” In *Davis v. Stanbury*, 8 Dowl. P. C. 440, the master seems to have certified the practice both ways. In *Tidd’s Practice*, 9th edit. 558, it is said that the affidavit may be intituled in the cause in which judgment is entered up: and in *Archbold*, 8th edit. 870, it is laid down that it may be intituled either way.

*Hayes* then proceeded to show cause.—The defendant is called upon to show cause why judgment should not be entered up against him in an action at the suit of “Bell;” whereas, the authority, strictly construed, as it must be, is, to enter up a judgment at the suit of “Melville, Sharpe, and Todd.” In *Archbold’s Practice*, 8th edit., p. 868, it is said: “The judgment must be entered up in the name of the party as authorized by the warrant. Where a warrant in ejectment authorizes the lessor of the plaintiff to enter up judgment, it must be entered up in the name of the nominal plaintiff: *Doe d. Routledge v. Stewart*, 1 Dowl. N. S. 818. If the warrant authorizes a judgment at the suit of A., this does not authorize one at the suit of his executors: *Short v. Coglin*, 1 Anstr. 225. So, upon a joint warrant given by two, without words of severalty, judgment cannot, in general, be entered up against one, even after the death of the other: *Gee v. Lane*, 15 East, 592; *Jordan v. Farr*, \*2 Ad. & E. 487 (E. C. L. R. vol. 29), 4 N. & \*497] M. 847 (E. C. L. R. vol. 30).” [JERVIS, C. J.—The affidavits clearly show that this is an action brought by the company for a debt due to the company. Is there any difference between a bond and a covenant? The statute 7 G. 4, c. 46, does not, I think, authorize the covenant or bond to be entered into with or given to the public officer.] All powers of this sort must be strictly pursued. In *Everett v. Cooch*, 7 Taunt. 1 (E. C. L. R. vol. 2), where a turnpike-act directed, that, if any person had cause of action against the trustees, he should sue the treasurer,—it was held, that the action against the treasurer was substituted only for such action as might be maintained against the whole body of trustees, and that an action would not lie against him for the act of five trustees, though they formed a quorum. In *Skinner v. Lam-*

bert, 4 M. & G. 477 (E. C. L. R. vol. 48), 5 Scott, N. R. 197, the enabling words of the company's act of parliament were much larger than those of the banking act; and upon that the court mainly rely in their judgment. Upon the same ground *Smith v. Goldsworthy*, 4 Q. B. 430 (E. C. L. R. vol. 45), proceeded. In *Steward v. Greaves*, 10 M. & W. 711,† it was held that a creditor of a banking copartnership established and carrying on business under the 7 G. 4, c. 46, *must* proceed against the public officer, under s. 9. But, in *Wills v. Sutherland*, 4 Exch. 211,† it was held upon a statute (4 & 5 Vict. c. xciii.) the words of which are the same as those of the banking act, that the secretary *may* sue for breach of a covenant with certain persons as trustees for the company, to pay calls. The latest case upon the subject is that of *Chapman v. Milvain*, 5 Exch. 61,† where it was held that a company of persons established for the purpose of carrying on the business of bankers under the provisions of 7 G. 4, c. 46, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the copartnership, are *bound* to sue in the name of one of their public officers, and are not at liberty to \*sue in the names of the covenantees named in the deed of copartner- [\*498 ship; the words of the 9th section of the act, "shall and may," being obligatory, and not merely permissive. The reasoning of the court, in giving judgment, does not apply to the case of a warrant of attorney: and, besides, it contains a qualification. "It will be said," observed Parke, B., "that the company, if this construction is to prevail, could not take a security to a trustee, who alone could have the legal title to sue,—a right which every individual has; and that it could not have been the intention of the legislature to deprive companies of that privilege. We are not prepared to say that the company might not so word the security to their trustees as to avoid that inconvenience, if it be one, and vest the sole right of action in the trustee; but, on a covenant worded as this is, we do not think that object, if it existed, was accomplished." What does that mean? [JERVIS, C. J.—That possibly the company *may* say that the action *shall* be by A., and by A. only.] The question is, whether they have not said so here. [WILLIAMS, J.—I have no doubt, that, if this banking company had asked to have the judgment entered up on this warrant of attorney in the names of Melville, Sharpe, and Todd, you would have cited *Chapman v. Milvain* to show that they could not do so.]

*Byles*, Serjt., *contra*, was stopped by the court.

JERVIS, C. J.—This rule must be made absolute. We are clearly bound by the authority of the two cases of *Wills v. Sutherland* and *Chapman v. Milvain*, which are expressly in point, unless a distinction can be made between a covenant and a warrant of attorney, which Mr. Hayes has hardly ventured to press. It would be strange, indeed, if such an objection could prevail. If the motion had been in the other

\*499] form, as my Brother Williams \*suggests, there can be but little doubt that those cases would have been cited as an answer to it.  
 The rest of the court concurring, Rule absolute.

ANDERSON and Others v. HILLIES. April 28.

A ship-broker having received freight under a charter-party on account of the owners, went over the accounts of his disbursements on behalf of the ship, with the captain (who was also the managing owner), and offered him a check for the balance. The captain declined to take it, but told the broker he wanted to get 250*l.* remitted to a person residing in New Brunswick; whereupon the broker went with him and opened a credit for that sum with the British North American Bank at New Brunswick, whence a bill was drawn upon the broker at sixty days' sight, which was afterwards duly honoured:—Held, that this was a good payment, as between the broker and the captain's co-owners.

DEBT, for money had and received, money paid, and money found due upon an account stated. The only material plea, was, never indebted.

The cause was tried before Jervis, C. J., at the sittings in London after last Hilary Term. The facts were as follows:—

The plaintiffs were ship and insurance-brokers in London. The defendant was part owner of a ship called *The Elizabeth Hastings*, in the years 1848 and 1849, his co-owners being James and Thomas Galt, the latter of whom acted as master as well as managing owner. The plaintiffs had been employed by Thomas Galt, in 1848, and had effected a charter-party for the ship for a voyage to Buenos Ayres and back to London, as brokers; and, on the return of the ship in July, 1849, they accounted with Thomas Galt for the receipts and disbursements, when the balance due to the owners was ascertained and settled at 268*l.* 5*s.* 11*d.*, for which sum they offered to give Galt a check; but Galt declined to take it, saying, he wished to remit a sum of 250*l.* to one John Hastings, at New Brunswick; and one of the plaintiffs, at his request, went with him to the British North American Bank, and there opened a credit in Hastings's \*name for that sum. The bank at New Brunswick being advised of the credit, paid John Hastings 250*l.*, for which sum he on the 15th of August, drew a bill in their favour upon the plaintiffs in London, at sixty days' sight. The bill was sighted on the 4th of September, 1849, and duly paid when it arrived at maturity.

In the mean time, the plaintiffs had obtained another charter for the *Elizabeth Hastings* for a voyage to Jamaica and back, making various advances to the captain for disbursements; and, in the result, after the completion of this voyage, there was a balance due from the owners to the plaintiffs, of 163*l.* 10*s.* 8*d.*, which was the amount sought to be recovered in this action.

Thomas Galt died on the 25th of October, 1849.

On the part of the defendant, it was objected that the remittance of the 250*l.* to Hastings ought not to be allowed in the account, inasmuch as it was not a payment in the usual course, but was made out of the ordinary course, and at a time when the plaintiffs knew that the master was in want of money for the necessary disbursements of the ship, and that, in truth, it was a fraud upon the co-owners.

His lordship directed a verdict for the plaintiffs, for the full amount claimed, reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the 250*l.* ought not under the circumstances to be allowed.

*Hugh Hill* accordingly obtained a rule nisi, against which,

*Lush* now showed cause.—The payment of the 250*l.* was clearly a valid payment. The account of the ship's receipts and disbursements having been adjusted, the brokers offered the captain a check for the balance. The captain, being desirous of remitting a sum of 250*l.* \*to Mr. Hastings, at New Brunswick, declined to take the check, but requested the plaintiffs to help him to get the 250*l.* remitted [\*501 to Hastings, which they accordingly did. That clearly was an authorized payment, within all the authorities. The rule is laid down in *Abbott on Shipping*, 7th edit. 419, thus:—"The cases of *Tapley v. Martens*, 8 T. R. 451, and *Marsh v. Pedder*, 4 Campb. 257, in which the master, having taken a bill of exchange for the freight, sued, after its dishonour, the owner of the goods, must not be understood as trenching upon the general principle established in several cases, that, if a creditor entitled to immediate payment, voluntarily, and for his own convenience, take a bill of exchange on a third person for his debt, he must abide the hazard of such security: *Everett v. Collins*, 2 Campb. 515; *Smith v. Ferrand*, 7 B. & C. 19 (E. C. L. R. vol. 14), 9 D. & R. 808; *Robinson v. Read*, 9 B. & C. 449 (E. C. L. R. vol. 17), 4 M. & R. 849. In *Tapley v. Martens*, where the bill was drawn upon the merchant, but not accepted by him, Lord Kenyon seemed disposed to concede, that, if the master had taken it for his own accommodation, it would have altered the case. In *Marsh v. Pedder*, Gibbs, C. J., expressly says, 'If the party, having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy. Here, it is not stated, nor is it to be supposed, that any offer to pay the whole of the freight in cash was ever made to him;' and this doctrine was expressly acted upon in the recent case of *Strong v. Hart*, 6 B. & C. 160 (E. C. L. R. vol. 13), 9 D. & R. 189 (E. C. L. R. vol. 22), 2 C. & P. 55 (E. C. L. R. vol. 12). The master and part owner of the ship *Atlantic*, having carried a cargo from St. John's, Newfoundland, to Bilboa, and delivered it there to the consignees under a bill of lading making the cargo deliverable to the consignor or his assigns, he or they paying freight for the same, took a bill for the

freight on the agent of the consignees, which was dishonoured, and then  
 \*502] sued the consignor. No direct \*evidence was given to show whether the master demanded payment in cash, and took the bill because he could not obtain such payment, or preferred taking the bill as more convenient. Lord Tenterden told the jury, that, if they thought the master took this bill voluntarily and for his own convenience, without insisting upon payment in cash, they were to find for the defendants; but, if they thought the master took the bill because he could not obtain payment in cash, to find for the plaintiffs. The court, on a motion for a new trial, approved of this direction." Here, Thomas Galt, the person to whom the payment was made, was the managing owner, and the person to whom the freight was payable under the charter-party. He unquestionably, therefore, had authority to receive it in any way he thought proper.

*Hugh Hill*, in support of his rule.—This was not a due payment. In Story on Agency, § 430, it is said: "The modes and circumstances under which payments are made to an agent, may have a material bearing on the rights of the principal. If the payments are received by the agent according to the ordinary course of business, or even if they are made out of the ordinary course of business, if the agent alone is known, or is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter will be bound thereby. But, if the transaction is on behalf of a known principal, or the principal is afterwards disclosed, no subsequent payment but such as is strictly authorized by the usual course of business, or by the particular usage of trade, or by the express or implied authority of the principal, will bind him; and, if made otherwise, the principal may, notwithstanding, recover the amount from the debtor." And, in § 431, it is said: "Secondly, in relation to payments made *by* agents to their  
 \*503] principals: In these cases, any mode of payment by the agent, \*accepted and received as such by the other contracting party as an absolute payment, will discharge the principal, whether he be known or unknown, and whether it be in the usual course of business or not. Thus, for example, if a factor, or other agent, should be employed to purchase goods for his principal, or should be intrusted with money to be paid for his principal, and the creditor or seller should take the note of the factor or agent payable at a future day, as an absolute payment, the principal would be entirely discharged from the debt, and the creditor, having thus given exclusive credit to the factor or agent, would have no remedy except against the latter. The question, in most cases of this sort, is not, generally, so much a question of law as of fact; that is to say, whether the note is received as a conditional payment, or as an absolute payment,—whether it is received with the knowledge that there is another principal, or not,—and whether there is an exclusive credit given to the agent, or not." For this latter posi-

tion it is that the learned author refers to 3 Chitty on Commerce, 204, *Seymour v. Pychlau*, 1 B. & Ald. 14, *Strong v. Hart*, 6 B. & C. 160 (E. C. L. R. vol. 13), 9 D. & R. 189 (E. C. L. R. vol. 22), 2 C. & P. 55 (E. C. L. R. vol. 12), *Smith v. Ferrand*, 7 B. & C. 19 (E. C. L. R. vol. 14), 9 D. & R. 803, and *Marsh v. Pedder*, 4 Campb. 257. [JERVIS, C. J.—What difference is there between the authority of the master to receive the freight under each bill of lading over the ship's side, or to receive it in the lump from the broker ?] None. *Strong v. Hart* goes further than any prior case; and it certainly has been upheld in a recent case.

JERVIS, C. J.—The main question in this case is one of considerable importance, and depends upon this,—whether the master, whose co-owners were entitled to a balance of 286*l.* 5*s.* 11*d.* on the account with the plaintiffs, their brokers, had authority to receive that balance \*in the way he did. The circumstances were these:—When the [\*504 account of the receipts and disbursements of the ship had been made out, and the balance due from the brokers ascertained, the latter offered the captain a check for the amount, which he declined to take, saying he wanted to remit 250*l.* to New Brunswick; whereupon one of the plaintiffs goes with him to the British North American Bank, and opens a credit with them on behalf of the person to whom the remittance is to be made; and in due course a bill is drawn for the amount, and afterwards paid. I am of opinion that that was a good payment, and that this rule must be discharged. It seems to be perfectly well established by the cases of *Marsh v. Pedder* and *Strong v. Hart*, and by a still more recent authority, that, in the case of freight, the master may, for his own convenience, take a bill instead of payment in cash. Mr. Hill admits that there is no distinction between the receipt of freight from an individual consignee, and a receipt from the broker of a lump sum: and there clearly is no distinction in principle. We may therefore take it to be fairly established, on authority, that, if the broker offers to pay the master the freight in cash or by a check, and the master prefers to take a bill, the payment by bill will be a good payment on account of his owners. Here, the transaction resolves itself into a payment by bill at the master's express request. In what respect does this differ from a common and ordinary payment? If the brokers had paid this balance in cash, and then the captain had asked them to procure him a letter of credit with part of it, nobody could doubt that that would have been a good payment. And, how does the case differ in principle from that? I think the 250*l.* properly formed an item to the plaintiffs' credit in the account, and consequently that they are entitled to retain their verdict.

\*CRESWELL, J.—I am of the same opinion. The 250*l.* is entered in the account as if it had been a payment by bill: but [\*505 that is hardly a correct way of describing the transaction. It appears,

that, money having been received from the shippers of goods by the plaintiffs in their character of brokers, they offered the captain a check: but that he declined to receive it, and asked them to assist him in the remittance of 250*l.* to a person at New Brunswick, which they did. Upon the authority of *Strong v. Hart*, I think that was a payment by which the co-owners are bound.

WILLIAMS, J.—I am of the same opinion. Upon principle as well as upon authority, I think the transaction as to the 250*l.* was substantially the same as if the plaintiffs had paid the balance to the captain in cash, and then the latter had employed them as his agents to dispose of the money as it was afterwards disposed of.

TALFOURD, J.—I also think that the payment in question was a perfectly good payment, and binding upon the master's co-owners.

Rule discharged.

END OF TRINITY TERM.

## \*MEMORANDUM.

[\*506]

## COSTS OF JUDGMENT BY DEFAULT

*Under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, as agreed at a meeting of the masters of all the courts, at the Queen's Bench Office, on the 9th of July, 1852.*

	Above 20l.	Under 20l.
Letters . . . . .	0 8 6	0 2 0
Instructions to sue . . . . .	0 6 8	0 3 4
Writ and endorsements . . . . .	0 12 6	0 10 0
Particulars of claim . . . . .	0 3 0	0 2 9
Copy and service of writ . . . . .	0 5 0	0 5 0
Affidavit, and oath . . . . .	0 6 0	0 5 0
Searching for appearance . . . . .	0 3 4	0 3 4
Copy writ to file . . . . .	0 1 0	0 1 0
Drawing judgment . . . . .	0 3 4	0 3 4
Attending to file copy writ and affidavit, and affidavit to sign judgment . . . . .	0 3 4	0 3 4
Paid filing . . . . .	0 1 0	0 1 0
Paid signing . . . . .	0 5 0	0 5 0
Letters . . . . .	0 3 0	0 2 0
	2 16 8	2 6 10
When writ served by correspondent, or where agency, and to include mileage and all charges . . . . .	3 8 0	2 15 0



CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS.  
AND IN THE  
EXCHEQUER CHAMBER,  
IN  
Trinity Vacation,  
IN THE  
SIXTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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TEMPLEMAN, Appellant; HAYDON, Respondent. *June 22.*

In an action in a county court, for negligently driving a horse and cart, the plaintiff having simply proved the fact of a collision, under circumstances which might or might not amount to negligence,—the defendant proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, and the driver thrown out, when the horse started off, and ran against and injured the plaintiff's horse. The judge of the county court, upon this evidence, ordered a verdict for the plaintiff,—“being of opinion that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner.”  
An appeal against his decision was dismissed with costs.

THIS was an appeal from a decision of the judge of the county court of Somersetshire, holden at Crewkerne, made on the 28th of April last, when a verdict was returned for the plaintiff, for 16*l.* 1*s.* 10*d.* The following is a copy of the claim:—

“This action is brought to recover the sum of 40*l.*, damages done to a horse and gig, the property of the plaintiff, on the 6th of December, 1848, by reason of the negligent driving of a horse and cart, the property of the defendant, whereby the same came into collision  
\*508] \*with the plaintiff's horse and gig, in the parish of Crewkerne, in the county of Somerset.”

The plaintiff below proved, that, on the 6th of December, 1848, he was driving in his gig from Crewkerne to West Chinnock, and had come to a place called Red Gate, having just passed a lane on his left hand, immediately beyond which, on the same side of the road, was a large heap of stones, against the bank. Facing the plaintiff was a hill, called Broadshard Hill, descending which, and about one hundred yards from him, he saw the defendant's horse and cart coming towards him at a very fast rate, and [the horse] kicking violently. The plaintiff attempted to turn back; but, in doing so, got his horse and gig across the road, leaving, however, sufficient room for the horse and cart to pass on the proper side: he then jumped out of his gig, and went behind it to take care of himself. While in this position, the defendant's horse and cart came into collision with the plaintiff's horse, and inflicted the injury for which the action was brought. The collision took place within a minute and a half from the time the plaintiff first saw the horse coming.

It was contended, on the part of the defendant, that the plaintiff ought to be nonsuited, as he had not proved any specific negligence, or facts from which negligence might be presumed.

The judge, however, overruled the objection.

On the part of the defendant, three witnesses were called,—the driver of the horse and cart, a woman who was riding in the cart with him, and a man named Berry, who was riding his horse close behind the cart, and witnessed the accident from beginning to end.

It was proved, that the cart contained the driver, the woman, and four dead pigs; that the driver had reins, but no stick or whip, and drove very slowly and steadily; that, about one hundred yards from the place of the \*collision, the horse suddenly began to kick very violently; that, after kicking for some little time, both shafts [\*509 of the cart broke off, the cart tilted up, and the driver and the contents of the cart were thrown out into the road, where he received a blow which rendered him insensible; that, up to the time of his being thrown out, he had the control of the horse, which was walking, though kicking violently; that, after he was thrown out, the horse started off at a faster pace, in the middle of the road, towards the plaintiff; that the cart was still attached to the horse by the traces; that the horse made a rush to pass on the side where the heap of stones was; and that, in their opinion, there was not sufficient room for him to pass with the cart on his proper side of the road.

It was also proved, that, up to the time of the accident, the horse had been perfectly quiet, free from vice, and steady in harness, and was properly harnessed in the cart on the defendant's premises on the morning of the accident.

The judge found the verdict for the plaintiff; being of opinion that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a pre-

sumption of negligence in the owner, and that that presumption was not sufficiently rebutted; but he reduced the claim of the plaintiff, on the ground, that, although he could not avoid some accident, he had subjected himself to greater damage by his own act.

The question for the opinion of the court is, whether, upon this evidence, the plaintiff ought to have been nonsuited, or a verdict found for the defendant instead of the plaintiff.

*Phipson*, for the appellant.—The case for the plaintiff in the court below clearly disclosed no evidence of \*negligent driving on the  
\*510] part of the defendant. [CRESSWELL, J.—You must look at the whole of the evidence.] The question, then, is, whether, looking at the whole of the evidence which was before him, the judge of the county court did right in giving a verdict for the plaintiff. [MAULE, J.—You must say, that, upon the whole evidence, the plaintiff ought to have been nonsuited.] The judge decides that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner. [MAULE, J.—He comes to the conclusion that there was evidence which afforded a cause of action against the defendant. We cannot take into consideration the steps by which he came to that conclusion. Even if we think he gave a wrong reason, we cannot hold his *conclusion* wrong.] The claim is for damages by reason of negligent driving; and the judge says that the breaking of the shafts, showed, —not negligent driving, but,—a defect in the cart, which raised a presumption of negligence in the owner, of a character of which the plaintiff did not complain. [MAULE, J.—The putting that in the case clearly makes no difference. The object of the statute 13 & 14 Vict. c. 61, was, not to give the amplest possible opportunity for scrutinizing the judgments of the county court; but to attain substantial justice, to the exclusion of as much technical argument as could conveniently be dispensed with. If either of the parties is desirous of having the law and the facts separated, he may do so by causing a jury to be summoned. But, where the whole matter is allowed to be decided together, if the judge, after hearing the evidence, thinks fit to give judgment for the plaintiff, the defendant is bound conclusively by his decision, however much erroneous law may be uttered by him.] No doubt, assuming the evidence to be properly left to the jury, the verdict cannot be impeached because the judge  
\*511] \*has unnecessarily laid down some proposition of law erroneously. But it is otherwise, where the judge says there is evidence to warrant a verdict for the plaintiff, when in point of law there is none. [MAULE, J.—It was not necessary for the judge here to say anything. That which in ordinary cases passes between the judge and the jury, passes only in the judge's mind, where he sits in the character of both judge and jury. CRESSWELL, J.—Suppose the case had rested simply

upon the plaintiff's evidence, you must admit that there was something to leave to a jury. You cannot recall that, because evidence on the part of the defendant is gone into. The plaintiff proved certain facts, which were proper to be submitted to a jury. The defendant proved, or attempted to prove, other facts. The whole is a decision upon the facts.] The defendant's evidence explains the whole. The judge was clearly wrong in saying that the breaking of the shafts showed a defect in the cart, which raised a presumption of negligence. There was no evidence at all of negligent driving. [CRESSWELL, J.—Suppose the cart to be so constructed, or so ill adapted to the horse, that, in going down hill, it rubs the horse's hocks,—would not that be negligent driving?] It is submitted not. [MAULE, J.—It is negligence, not to drive an infirm vehicle with such a degree of care as its infirmity requires; just as it would be negligence to drive a high-spirited horse with no more care than a dull one. I must confess I do not see why the judge might not very properly call this evidence of want of care.] In *Aldridge v. The Great Western Railway Company*, 3 M. & G. 515 (E. C. L. R. vol. 42), 4 Scott N. R. 156, in case against a railway company for so carelessly and improperly managing and directing an engine on their railway by their servants, that sparks flew from the engine upon a stack of beans standing in an adjoining field, belonging to the plaintiff, whereby the stack was destroyed,—a case stated for the opinion \*of this court, [\*512 alleged that the engines used upon the railway were such as were usually employed on railways, for the purpose of propelling the trains and carriages thereon; and that the engine from which the sparks that set fire to the stack in question flew, was used at the time in the ordinary manner, and for purposes authorized by the act of parliament incorporating the company: and the Court held, that the facts stated were not sufficient to enable them to infer negligence on the part of the defendants, so as to justify them in directing a verdict for the plaintiff,—though they did not show such an absence of negligence as to warrant them in directing a nonsuit. Tindal, C. J., there says: "I am not prepared to say that there is no evidence of negligence: I cannot say that the very circumstance of fire being emitted from an engine does not amount to carelessness. Neither am I prepared to say that the verdict ought to be entered for the plaintiff: to entitle him to recover, he is bound to show some carelessness on the part of the defendants, or circumstances whence the jury may infer carelessness." That case is exactly in point. [MAULE, J.—The engine there did not require to be driven in a different manner, whether it were defective or not.] There was no evidence whatever to warrant the conclusion the judge came to,—no evidence either of negligent driving, or that the defendant knew of any infirmity in the cart.

*Kingdon*, contra, was not called upon.

MAULE, J.—The 14th section of the 13 & 14 Vict. c. 61, enacts, "that, if either party in any cause of the amount to which jurisdiction is given

to the county courts by that act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission \*513] or rejection of any evidence, such \*party may appeal from the same to any of the superior courts of common law at Westminster." In this case, a number of facts are stated, and the conclusion the judge has drawn, is, that the plaintiff is entitled to recover a certain sum. It appears to me, that, if from these facts such a conclusion could legitimately be drawn, the decision is not the subject of appeal. If, in coming to a right conclusion, the judge lays down some proposition of law erroneously, I do not think that is such a "determination in point of law," as the legislature meant to be a ground of appeal. I must confess, I do not very well see how there can be an appeal against the "determination or direction of the judge in point of law," where the parties do not choose to have a jury. The county court has no function to determine law unmixed with fact. And there would be no inconvenience in so construing the act: on the contrary, it would be very convenient, inasmuch as it would prevent questions of law from arising in a very inconvenient way. As to the question of law which the judge is here said to have made the foundation of his judgment, I am far from saying that I think it erroneous. Where a cart is defective, or a horse is possessed of certain qualities, it may be negligence on the part of the driver if he does not deal with them according to their respective conditions or qualities. If a horse is full of life and spirit, it necessarily demands more care than one which is sluggish and worn out. So, a cart that is infirm requires to be driven more steadily than one which has undergone less wear and tear. And it may well be that a failure of conduct in respect of either would amount to negligent driving. I merely throw out these remarks, but desire to be understood as not founding my decision upon them. I hold that the appeal should be dismissed with costs.

\*514] CRESSWELL, J.—The judge of the county court has \*sent us a statement of evidence, and a statement of the reasons which induced him to order a verdict for the plaintiff; and then he concludes with this question,—whether, upon this evidence, the plaintiff ought to have been nonsuited, or a verdict found for the defendant, instead of the plaintiff. I am of opinion, upon this evidence, that the plaintiff ought *not* to have been nonsuited. We are not asked to say whether the evidence warranted the verdict for the plaintiff, or not.

Appeal dismissed, with costs.

STEPHEN CANNON, Demandant; WILLIAM BALLANTINE  
RIMINGTON, Tenant. *June 22.*

To a count in formedon, the tenant pleaded three pleas, upon two of which issues of fact were joined, and upon the third an issue in law. All the issues, as well of law as of fact, were found for the demandant:—Held, that he was not entitled to the costs of the issues of fact, under the 4 & 5 Anne, c. 16, s. 5, that section not applying to real actions; but that he was entitled to the costs of the demurrer, under the 3 & 4 W. 4, c. 42, s. 34, the words being general, and comprehending *all* actions.

THIS was a writ of formedon. The demandant by his count claimed certain lands in Cumberland, which Stephen Cannon, his grandfather, gave to Stephen Cannon, his father, and which after the death of Stephen Cannon, the father of the demandant, ought to descend to the demandant, the son and heir of the said Stephen Cannon, the father, according to the form of the gift.

The tenant pleaded three pleas,—first, a traverse of the devise to the demandant's father,—secondly, that the right and cause of action did not descend or accrue within twenty years next before the suing and bringing of the writ of formedon,—thirdly, that Stephen Cannon, the father, discontinued the possession of the said tenements, with the appurtenances, twenty years before the commencement of the action, and that, since that time, neither he nor the defendant had been in possession or in receipt of the profits.

\*Issues of fact were joined upon the first plea, and upon the replication to the second plea; and there was a demurrer to the [515 replication to the third plea.

Judgment was given for the demandant, upon the demurrer, in Hilary Vacation last,—*vide ante*, p. 1.

On the trial of the issues in fact, before Cresswell, J., at the last Spring Assizes for the county of Cumberland, the demandant had a verdict.(a)

*Spinks*, in the last term,—upon an affidavit setting forth the facts, and stating that the judge before whom the issues were tried did not certify that the demandant was not to have the costs of the trial of the said issues,—obtained a rule calling upon the tenant to show cause why the master should not tax the demandant's costs, as well of the issues, as of the demurrer; the master having declined so to do, on the ground that no costs are allowed in formedon. He referred to the statutes 8 & 9 W. 3, c. 11, s. 2, 4 & 5 Anne, c. 16, ss. 4, 5, and 3 & 4 W. 4, c. 42, s. 34, and to the case of *Duberley v. Page*, 2 T. R. 391.

*Hugh Hill*, and *Unthank*, on a subsequent day, showed cause.—The rule asks for the costs of the issues, under the statute of Anne; and for the costs of the demurrer, under the 3 & 4 W. 4, c. 42, s. 34.

1. The 4th section of the 4 & 5 Anne, c. 16, enacts "that it shall

(a) The ruling of the learned judge was excepted to, and a venire de novo awarded,—*vide ante*, p. 18. On the second trial also the demandant obtained a verdict.

and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence." And s. 5 \*provides, "that, \*516] if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or, if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him." If this had been an ordinary action, *Callander v. Howard*, 10 C. B. 302 (E. C. L. R. vol. 70), would have been applicable. There, to assumpsit upon certain bills of exchange, with a count for goods sold and delivered, money paid, and interest, and a count upon an account stated, the defendant pleaded sixteen pleas, to one of which (*going to the whole cause of action*) there was a demurrer: upon the trial, *all* the issues of fact were found for the *plaintiff*; and, upon the argument of the demurrer, the judgment was for the *defendant*: and this court held,—in conflict apparently with *Partridge v. Gardner and Howell v. Rodbard*, 4 Exch. 303, 309,† and affirming *Bird v. Higginson*, 5 Ad. & E. 88 (E. C. L. R. vol. 31), 6 N. & M. 791, and *Clarke v. Allatt*, 4 C. B. 335 (E. C. L. R. vol. 60),—that the plaintiff was entitled to the costs of the issues of fact, though the defendant had the general costs of the cause. But costs were never allowed in real actions. The object of the statute of Anne, was, to provide for costs which were not provided for before, viz., where the success was divided. In *Richmond v. Johnson*, 7 East, 583, Lord Ellenborough says: "The statute of Anne meant to give an advantage to a defendant, of pleading several matters, though, in so doing, it provided that such privilege should not be exercised vexatiously to the plaintiff: therefore it says, that, if any *issue* shall be found for the plaintiff, he shall have costs, &c., unless, &c.; by which I understand, that, if any one or more of \*517] several issues be found for the plaintiff, the rest being \*found for the defendant, the plaintiff shall have his costs of those pleas found for him, unless the judge shall certify, &c. This was to check a superfluity of pleading, and was necessary to be introduced where any one bar was found for the defendant, which would give him the general costs of the cause, except for this provision: but, where all the issues were found for the plaintiff, he did not want any new provision to give him the costs of the pleadings. And this shows that the statute of Anne was not meant to apply to such a case. Where, indeed, the case is within the 5th section of that statute, as, if, upon demurrer joined, the matter be judged insufficient, the costs are in the discretion of the court only as to the quantum; that is, to be taxed by the proper officer, as in other cases; or, if a verdict be found upon any issue for the

plaintiff, &c., which is to be understood in the sense I have before mentioned,—‘unless the judge who tried *the said issue* shall certify,’ &c.; and, in that case, the defendant shall be exempted from the costs of those issues found for the plaintiff, which he would otherwise have been obliged to pay.” That was the construction invariably put upon the statute of Anne, down to the time of *Bird v. Higginson*. The decision in *Bird v. Higginson* proceeded entirely upon the authority of cases one and all of which were cases of partial success. In *Partridge v. Gardner* and *Howard v. Rodbard*, the Court of Exchequer found themselves upon *Richmond v. Johnson*. [JERVIS, C. J.—When *Partridge v. Gardner* came before the Exchequer Chamber,—6 Exch. 621,†—that court proceeded entirely upon the declaration, disclaiming to consider the general question: Lord Campbell says: “The statute of Anne seems to proceed upon the supposition that there is a good cause of action disclosed in the declaration, and that, *where there is none, the plaintiff shall not get his costs.*” It is unnecessary, however, to embarrass ourselves with those cases here.]

\*2. The 34th section of the 3 & 4 W. 4, c. 42, enacts [\*518 “that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.” The words of the 8 & 9 W. 3, c. 11, s. 2,(a) were equally large and extensive; and they never were held to give costs upon a demurrer in a real action. [JERVIS, C. J.—That statute did not extend to give costs upon a demurrer to a plea in abatement: *Thomas v. Lloyd*, 1 Salk. 194, 1 Lord Raym. 386; *Garland v. Extend*, 1 Salk. 194; *Michlam v. Bate*, 8 B. & C. 642 (E. C. L. R. vol. 15), 3 M. & R. 91. They are allowed now.]

*Spinks*, in support of his rule.—1. The demandant is entitled to the costs of the issues, under the statute of Anne. If the 4th section applies to this action, there can be no good reason why the provision in s. 5 as to costs should not apply also, unless the legislature is to \*be supposed to be so absurd as to say, that the tenant shall pay [\*519 costs if he succeeds partially, but that, if he fails altogether, he shall pay nothing. *Richmond v. Johnson* decided, that, where a plain-

(a) That section, after reciting, that, “forasmuch as, for want of a sufficient provision by law for the payment of costs of suit, divers evil-disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts,” enacts “that, if any person or persons shall commence or prosecute in any court of record any action, plaint, or suit, wherein upon any demurrer, either by plaintiff or defendant, *demandant or tenant*, judgment shall be given by the court against such plaintiff or demandant, or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff or demandant shall sue any writ or writs of error to annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein, the defendant or tenant in any such action, plaint, suit, or writ of error, shall have judgment to recover his costs against every such plaintiff or plaintiffs, demandant or demandants, and have execution for the same by ca. sa., s. fa., or elegit.”



tiff is entitled to judgment upon the whole record, but, by reason of some collateral matter, such judgment gives him no costs, he is not entitled to costs under the statute of Anne. [CRESSWELL, J.—Your exposition of that case is, that the statute of Anne does not repeal the power of the judge to certify under the statute of 43 Eliz. c. 6, s. 2.] Exactly so. [MAULE, J.—There are several subsequent decisions which are in point against you.] All these are overruled by *Callander v. Howard*. [MAULE, J.—We certainly did not intend to overrule them. We thought there was no distinction between issues of fact and issues in law. In *Bird v. Higginson*, the Court of Queen's Bench decided the same way, after full consideration. If the statute of Anne is considered to apply where the tenant has judgment upon the whole record, it may just as well apply where the demandant has judgment upon the whole record, because the necessity for resorting to that statute exists as well in the one case as in the other. Has any case ever decided that the statute of Anne applies to real actions, where no costs are recoverable?] None, certainly, has been found.

2. The 8 & 4 W. 4, c. 42, s. 34, clearly applies to this case: its words are express,—“where judgment shall be given either for or against a plaintiff or *demandant*, or for or against a defendant or *tenant*, upon any demurrer joined in *any action whatever*, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.” The only answer that can be surmised to that, is, that, like the 8 & 9 W. 3, c. 11, s. 2, that section was intended to apply only to cases where, by the statute of Gloucester, 6 Ed. 1, c. \*520] 1, the party would be entitled to costs. But that \*clearly is not so. Prior to the passing of the 8 & 4 W. 4, c. 42, a defendant who obtained judgment on a demurrer, or judgment as in case of a non-suit, in quare impedit, was not entitled to costs: *Thrale v. The Bishop of London*, 1 H. Blac. 580; *Wyndowe v. The Bishop of Carlisle*, 3 Bingh. 404 (E. C. L. R. vol. 11), 11 J. B. Moore, 269 (E. C. L. R. vol. 22). But, in *Edwards v. The Bishop of Exeter*, 7 Scott, 679, 6 N. C. 146, quare impedit was held to be within the 8 & 4 W. 4, c. 42, s. 34. If quare impedit be within it, there can be no reason why formedon should not be so likewise. No legitimate argument unfavourable to this view can be drawn from the circumstance of the language of the 8 & 9 W. 3, c. 11, s. 2, being almost equally general with that of the 8 & 4 W. 4, c. 42, s. 34, because the intention of the 8 & 9 W. 3, sufficiently appears from the previous statutes, and from the recital in the 2d section itself. Even under the 4 & 5 Anne, c. 16, s. 5, it is submitted the demandant is entitled to the costs of the demurrer.

JERVIS, C. J.—The cases of *Wyndowe v. The Bishop of Carlisle*, and *Edwards v. The Bishop of Exeter*, seem to be authorities to show that the demandant is entitled to the costs of the demurrer, under the statute 8 & 4 W. 4, c. 42, s. 34. As to the costs of the issues, however, on

the statute of Anne, there is some difficulty. We must, therefore, take a little time for deliberation. *Cur. adv. vult.*

MAULE, J., now said: When this case was before us during the last term, we intimated an opinion, that, notwithstanding the general law that costs were not to be allowed in real actions, the language of the 84th section of the 3 & 4 W. 4, c. 42, was so large and comprehensive that they could not be restrained in the manner urged on the part of the tenant; and therefore that the \*demandant in this case was [\*521 entitled to the costs of the demurrer to the replication to the third plea. But, as regards the costs of the issues, we think they cannot be allowed, consistently with the decisions upon the statute of Anne. We think costs are not given by that statute where by the statute of Gloucester, there being no damages, general costs are not given.

The demandant, therefore, will have the costs of the demurrer, but not the costs of the issues found for him on the trial.

Rule absolute accordingly.

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## \*IN THE EXCHEQUER CHAMBER. [\*522

HEATH v. UNWIN. June 21.

The plaintiff obtained letters-patent for "improvements in the manufacture of iron and steel."

In his specification, he declared his invention to be (amongst other things), "the use of carburet of manganese in any process whereby iron is converted into cast-steel;" and he described the process which he claimed, thus:—"I do it, by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of "carburet of manganese, in any process for converting iron into cast-steel."

The defendant produced the same result,—a superior and more valuable description and quality of cast-steel,—as certainly, and more cheaply, by substituting for the carburet of manganese, *oxide of manganese and coal-tar*, which, being put into the crucible with the iron, according to the evidence of chemists, would form "carburet of manganese" before the iron was in a state of fusion, and consequently before any combination therewith could take place:—

Held, upon a bill of exceptions,—by Wightman, J., Erie, J., Platt, B., and Crompton, J. (dissentientibus Alderson, B., and Coleridge, J.),—that the judge was wrong in telling the jury that there was no evidence of infringement.

THIS was an action upon the case for an infringement of a patent. The declaration stated that the plaintiff Josiah Marshall Heath was the first and true inventor of certain improvements in the manufacture of iron and steel; that he, on the 5th of April, 1839, obtained a patent for his said invention; that he duly filed his specification on the 4th of October, 1839; and that the defendant, without the leave or license, and against the will of the plaintiff, did in part use and put in practice the said invention, and did make divers, to wit, 1000 tons of cast-steel, and 1000 tons of other steel, by the said improved method, and in imi-

tation of the said invention of the plaintiff, and in breach of the said letters-patent, and also did vend and sell divers, to wit, 1000 other tons of cast-steel, and 1000 tons of other steel, made by the said improved method, and in imitation of the said invention and in breach of the said letters-patent, &c., whereby the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits \*528] which he might and otherwise \*would have derived and acquired from his said invention, &c.

Pleas,—first, not guilty.

Secondly,—that the plaintiff was not the first or true inventor of the said improvements in the declaration mentioned, in manner and form as the plaintiff had above in that behalf alleged; concluding to the country.

Thirdly,—that the nature of the said invention in the declaration mentioned, and the manner in which the said invention was and is to be performed, were not nor are they particularly described or ascertained, according to the true intent and meaning of the said letters-patent, in or by the said specification in the declaration in that behalf mentioned, in manner and form as the plaintiff had in the declaration in that behalf alleged; concluding to the country.

Fourthly,—that the said invention in the declaration mentioned was not, at the time of making and granting the said letters-patent, a new invention, but, on the contrary thereof, had been wholly and in part publicly and generally practised, used, and vended, to wit, within that part of the united kingdom of Great Britain and Ireland called England, before the date and grant of the said letters-patent, to wit, on the first of January, 1820, and on divers other days between that day and the date and grant of the said letters-patent; by reason whereof the rights, liberties, privileges, benefits, monopolies, and advantages by the said letters-patent granted, and the prohibitions therein contained, were, at the time of the making and granting of the said letters-patent, and from thence hitherto had continued to be, and at the said several times when, &c., were, and still remained, wholly void and of no effect, and the same were wholly lost and forfeited to and by the plaintiff; wherefore the defendant, at the said several times when, &c., committed the said several \*524] grievances in the declaration \*mentioned, as he lawfully might for the cause aforesaid: verification.

Fifthly,—leave and license.

Replication, joining issue on the first, second, and third pleas, and traversing the fourth and fifth.

The cause was tried before Cresswell, J., at the sittings at Westminster after last Michaelmas Term.

The plaintiff put in the specification, bearing date the 4th of October, 1837, and which was proved to have been duly filed and enrolled, as follows:—

“To all to whom these presents shall come, I, Josiah Marshall Heath, of, &c., send greeting: Whereas, her present most excellent Majesty Queen Victoria, by her royal letters-patent under the Great Seal of Great Britain, bearing date at Westminster, the 5th of April, in the second year of her reign, 1839, did, for herself, her heirs and successors, give and grant unto me, the said Josiah Marshall Heath, her special license, full power, sole privilege, and authority, that I said the said Josiah Marshall Heath, my executors, administrators, and assigns, and such others as I, the said Josiah Marshall Heath, my executors, administrators, or assigns, should at any time agree with, and no others, from time to time, and at all times during the term of years therein mentioned, should and lawfully might make, use, exercise, and vend within England, Wales, and the town of Berwick-upon-Tweed, my invention of certain improvements in the manufacture of iron and steel; in which said letters-patent is contained a proviso obliging me the said Josiah Marshall Heath, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention, and in what manner the same is to be performed, and to cause the same to be enrolled in her Majesty’s High Court of Chancery within six calendar months next and immediately after the date of the said in part recited \*letters-patent,—as in and by the same, reference being thereunto had, will more fully and at large appear: Now, [\*525 know ye, that, in compliance with the above proviso, I, the said Josiah Marshall Heath, do declare the nature of my said inventions to be,—first, the extraction of pure cast-iron from certain ores of that metal, without the intervention of any earthy alkaline or saline matter, to form a vitreous flux, cinder, or slag,—secondly, the formation of cast-steel, by fusing the said pure cast-iron along with malleable iron, or certain metallic oxides, in such proportion as may decarburate the cast-iron to a certain degree, and by completing the decarburation in a suitable cementing furnace,—thirdly, the use of a certain portion of oxide of manganese in the process of converting cast-iron into malleable iron by the process of puddling,—and, fourthly, *the use of carburet of manganese in any process whereby iron is converted into cast-steel.* And, in further compliance with the said proviso, I, the said Josiah Marshall Heath, do declare the manner in which my said inventions are to be performed, by the following general explanations and particular details of the several processes:—

“Malleable iron is at present produced by smelting the richer iron ores with just as much charcoal, or other carbonaceous matter, as shall be adequate to abstract all the oxygen from the ore, and bring it into the malleable state, or by smelting the ore in contact with carbonaceous matter in such excess as to form with the metal the compound called carburet of iron by chemists, and cast-iron by manufacturers, and then to separate the carbon by a distinct and subsequent process. The first

of these methods is that practised upon the purer native oxides of iron, in the catalan forges of the Pyrenees, in the Stuck Ofen of Corinthia, and in the Bloomeries of India: the second is that practised in the blast-furnaces of Great Britain upon the argillaceous ores of iron. By \*526] the first process, malleable or bar iron of very unequal quality in its different parts is produced; by the second process, a cast-iron is obtained which is contaminated to a very considerable degree with sulphur, phosphorus, arsenic, silicon, aluminum, &c.; and by both processes a very large proportion of the metal is wasted into cinder under the blast, as well as in the operations of puddling and re-heating the blooms. A pure native oxide, or carbonate of iron, is alone capable of producing a pure metal, convertible into good steel; but such pure ores have been hitherto debased and deteriorated in the smelting, by mixture with earthy, saline, or alkaline matters, under the name of fluxes, added with the intention of promoting the reduction of the metal, and of protecting it, when reduced, from the oxidizing influence of the blast. I have discovered, after an extensive course of experiments, that such earthy or other mixtures are not necessary towards the reduction of the pure native oxides and carbonates of iron; and this discovery constitutes my first invention under the present letters-patent. This invention consists in smelting such pure ore, without the formation of any vitreous flux, slag, or cinder, in manner as follows:—I commence the operation by filling progressively my blast-furnace with coke, charcoal, or other equivalent fuel, leaving the tap-hole open, that the flame of the fuel, urged by the blast, may play in all directions, downwards as well as upwards, so as to bring the whole interior of the furnace into a uniform state of incandescence; and, whenever the furnace is thus filled with ignited fuel, I close the tap-hole, and immediately throw into the mouth of the furnace 20lbs. of ore for every 100lbs. of fuel; and I continue to charge the furnace at this rate until such time as it is calculated that three or four cwt. of fluid iron are collected in the hearths, at which time I tap the furnace, and run off \*527] the melted metal into pigs. After this first discharge or \*casting, I begin to add the ore at the rate of 25lbs. for every 100lbs. of fuel, and continue to charge the furnace at this rate during a period of twelve hours, at which time I tap and run off a second casting of pig-iron: after this second discharge, I add ore at the rate of 80lbs. for every 100lbs. of fuel, during the third working period of twelve hours: and thus, in each successive period of twelve hours, I increase the burthen of ore at the rate of 5 per cent. of the weight of the fuel, till eventually the proportion of ore shall amount to about 65 or 70lbs. for every 100lbs. of fuel. By proceeding in this way, and by throwing in the ore merely reduced to the size of peas, or thereabouts, but not roasted, I find, that, if the furnace be well attended to by the workmen, it will turn out about 50lbs. of pure pig-iron for every 100lbs. of

fuel that are consumed. I prefer to run the fused metal into iron moulds, because I have found, that, when it is run into sand, as is commonly practised by the iron-smelters, it is apt to get covered with a coat of silicious matter, and is thereby contaminated and subject to waste in the subsequent conversion into malleable iron or steel: but I do not claim running the iron into iron moulds, as any part of my invention.

"Having by the said process obtained a pure cast-metal, or a simple carburet of iron uncontaminated with the sulphur, phosphorus, silicon, and other metalloids present in ordinary cast-iron, I next proceed to convert that carburet into steel of any degree of hardness; which conversion I perform as follows:—I first melt the said cast-iron in a cupola furnace, by the heat of coke, as free from sulphur as possible, or by a mixture of such coke and anthracite, or, in certain localities, by wood charcoal; but, in all cases, I use no more fuel than is merely requisite to melt the iron; so that the oxygen of the blast will serve to burn away the carbon of the carburet, in a considerable degree, while I neutralize or remove \*a further portion of the carbon by the addition of scraps [\*528 of metallic iron, or by the oxides of iron or of manganese, always taking care not to decarburate the metal to such a degree as to render it infusible, but to have about as much carbon in it as exists in cast-steel. For the purpose of producing a superior article of cast-steel from my said pure cast-iron obtained by the above-described process, I introduce sesquioxide of manganese, or peroxide, which had been previously ignited, in quantities not exceeding 5 per cent., into the cupola, while I employ no more fuel than the blast can readily burn into carbonic acid, for otherwise the excess of the carbonaceous fuel would deoxidize the manganese, nullify its decarburating action upon the cast-iron, and thus prevent it from reducing the metal to that lower stage of carburet which constitutes cast-steel. I also sometimes introduce into the cupola, for the same decarburating process, a portion not exceeding 5 per cent. of chrome ore, which consists of the oxides of chrome and iron, or a like proportion of pure oxide of iron. When the decarburation has been carried on in the cupola to the proper pitch, as has been already defined, the steely metal is to be run out, and cast into iron moulds; the ingots thereby formed are now to be converted into steel of any desired degree of mildness, by a further process of decarburation, which consists of stratifying the said ingots alone with peroxide of iron, or peroxide of manganese, without charcoal, in a steel-cementing or other suitable furnace,—such furnace to be lined with iron, if it is constructed of fire-bricks or stone, to prevent the action of the peroxides upon the stone or bricks of the furnace: the ingots are to be here subjected to a cementing heat for a certain period, proportional in duration to the softness required in the metal.

"I further propose to improve the quality of malleable or bar iron, by

\*529] adding to the pig or plate iron in the \*puddling furnace, while in fusion, from one to five per cent., or thereabouts, of any pure oxide of manganese, but without mixture of any other substance,—the sesquioxide being that which I prefer.

“Lastly, I propose to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are when fluid to be poured into an ingot-mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of the carburet of manganese, in any process for the conversion of iron into cast-steel.

“I claim,—first, the reduction of the pure native oxides and carbonates of iron into cast-iron, without the intervention of flux or the production of cinder,—secondly, the production of cast-steel by decarburating cast-iron to a certain degree, in a cupola or other suitable furnace, or crucible, with the addition of malleable iron or certain metallic oxides, and completing the decarburation to the required degree by subsequent cementation, in a suitable furnace, with an oxide of manganese or an oxide of iron, without any admixture of carbonaceous matter,—thirdly, the employment of manganese alone in the puddling of cast-iron,—and, fourthly, the employment of carburet of manganese in preparing an improved cast-steel.”

The following witnesses were called on the part of the plaintiff:—

Charles Atkinson, a manufacturer of steel at Sheffield:—“I have \*530] been in business nearly thirty years. \*There is bar-steel, shear-steel, and cast-steel. Bar-steel is bar-iron carbonized in a converting-furnace: shear-steel is bar-steel manipulated by a certain process under a forge-hammer. The bar-steel is beat under the forge-hammer into lengths about three feet by one inch and a half: shear-steel is bar-steel beat into lengths of three feet by one inch and a half square: it is then joined together, and heated in a furnace to that degree which produces a flux or welding heat. It is then beat under the forge-hammer until it forms a solid substance, purified from the earthy matter that it contained. In that process there was very considerable waste,—about one-fourth: the process was expensive; the value of shear-steel per ton entirely depended on the material it was made from; the material necessary for shear-steel was about on the average of 30*l.* to 40*l.* per ton. Shear-steel, when made into bars, was generally worth from 50*l.* to 60*l.* per ton. Cast-steel is bar-steel of a high conversion, that is to say, considerably carbonized. It is broken into small pieces, about two inches square, put into crucibles, in weights varying from

28lbs. to 40lbs. in each crucible; it is there exposed to a very high heat, until the whole becomes liquid: it is then poured into moulds of the size and description necessary for the purpose for which the steel may ultimately be required. Blistered-steel is bar-steel with a blister upon it: it is generally known in the trade by that term. Blistered-steel is synonymous with bar. The blisters are generally raised in that part of the bar which happens to be not properly welded, or sound; the heat, during the state of carbonization or conversion, producing a separation of the parts of the iron not sufficiently welded together in the first process. Bars of blistered steel, broken into small pieces, are put into a crucible of clay, a small portion of coke-dust being used in the composition of the crucible; the crucible or pot is then placed in a wind or \*air-furnace, during the process of the operation on the steel. The best marks of steel iron are always either Swedish [\*531 or Russian, except what has come from India. I consider, if certain improvements were introduced, that would be the best that has ever been. The price of the best marks of Swedish iron will average from 25*l.* to 35*l.* per ton. All steel will not weld to iron. Before 1839, no cast-steel that I ever heard of, could be welded to iron that was not the best Swedish or foreign iron. That very much enhanced the price of cutlery,—of table-knives, tools, and things of that description. I am aware of the plaintiff's process in the manufacture of cast-steel. I understand that carburet of manganese is a combination of carbonaceous matter and manganese. By the use of Heath's composition, we can manufacture from British iron, cast-steel that will weld. The price for the ordinary and common kinds of cast-steel, before the introduction of this process, was rarely less than from 40*l.* to 50*l.* per ton: the price now is from 30*l.* to 20*l.*, and I believe still lower. The composition is put into the melting-pot or crucible, in various stages, according to the fancy of the party, or their experience. Some put it in when the steel is cold, and some just before fusion. For 30lbs. of metal, a proportion of manganese of from one to three ounces, is put into the crucible. I have used Mr. Heath's composition. It does not break the pots. When the oxide of manganese is used alone with the blistered-steel, without the carbonaceous matter, it does break the pots: it causes them to fall in pieces. It not only splits the pot to pieces, but the metal runs into the material of the pot,—it becomes porous, so as to admit it; the material of the crucible appeared to be rendered porous, so as to let the metal run through. Before 1839, I had heard of attempts to make welding-steel by the use of the manganese of commerce. I never remember hearing the term of carburet \*of manganese. The trials of which I had heard were of the black [\*532 oxide of manganese. I never heard of success."

On cross-examination, this witness said,—“I never used carburet of manganese, to my knowledge, in the manufacture of steel. I use oxide



of manganese and some carbonaceous matter. The carbonaceous matter introduced prevents that mischief of the breaking of the pots which the oxide of manganese itself used to cause. The pots do not break. The first time I ever heard of carbonaceous matter being used in connexion with oxide of manganese, was about the period that Mr. Heath obtained his patent. We use oxide of manganese and carbonaceous matter together in combination. We take a certain proportion of oxide of manganese and of the carbonaceous matter reduced to a powder, and form a solid substance like paste, and a certain weight of that we put into the pot. We mix them ourselves. I first used this mixture at the latter end of the year 1839, or the early part of 1840."

Augustus William Johnson, a manufacturer of steel, at the Chelsea works: "I was a manufacturer of steel at the Chelsea works for about thirty years. I have known the plaintiff about twenty years. He erected works near mine at Thames Bank, for making cast-steel,—furnaces for casting steel,—previous to the date of the patent in 1839. I made experiments for him at my works a considerable time previous to the date of the patent. Carburet of manganese having been made by him and my workmen, was put into the crucible with the blistered steel. That was previous to the taking out of the patent. Those experiments were conducted by himself, on my premises. I made cast-steel, after the patent, by the use of carburet of manganese. It was the best steel that could possibly be made; there was nothing ever \*533] produced in England equal to it before; it \*had the properties of welding; it was a welding cast-steel, and a steel that you could not, generally speaking, spoil. The greatest quantity of cast-steel is spoiled in the heating: a workman takes a piece of cast-steel, and burns it, and spoils it: that could not be the case with this; it would bear a welding heat: he could give it a proper heat to weld it, without the danger of spoiling it: such a steel had never been made in England, to my knowledge. Cast-steel that would weld, had not, to my knowledge, been known before, unless it was by a chemical process; and then it was very rarely the case. I used considerable quantities of the carburet of manganese, under a license from Mr. Heath, and made large quantities of welding cast-steel, which I had made into cutlery of all descriptions: after that, I used what Mr. Heath gave me: it was a black mixture which got hard by keeping; there was coal-tar and manganese in it. Previously to Mr. Heath's process, I had never known of the use of manganese at all in the manufacture of steel: it was the greatest improvement that could possibly be made, and a great advantage to the trade."

Thomas Bevins:—"I am a file-cutter, and was formerly in the employ of Johnson & Co. at Sheffield. I know Mr. Heath. I remember his making experiments in the making of cast-steel, at the Chelsea works. We made some experiments at the Chelsea works, and also we had a

work erected next door. In the first instance, we used the carburet of manganese for the making of cast-steel. I prepared the carburet of manganese, by lining the pots with charcoal, mixing of oxide of manganese with coal-tar, putting it into the pot with it, and exposing it to an excessive heat: the product of that was, the carburet of manganese. The carburet of manganese was put into the pot when the steel was in a fused state: it improved the quality of the steel wonderfully. I had been in the iron and steel business all my life,—\*about forty [534 years. Up to that time, I had never heard of the use of carburet of manganese in the making of cast-steel. It makes the steel more malleable. *We found afterwards, that, instead of making the carburet of manganese first, if we took the coal-tar and the manganese, and put them into the crucible where the steel was being melted, it produced the same effect.* We mixed them together into a sort of paste, and then put them into a crucible where the melting steel was at the time: we put the paste into the crucible; the steel was melting nearly, within a few stages. We made the one heat, and one pot, serve the double process. I have tried to use the oxide of manganese alone, without the carbonaceous matter: I could not keep it in the pot; it spoiled the pot. I found that using the paste instead, without first forming the carburet,—putting the paste into the crucible with the steel, and making one pot and one heat serve the double purpose,—answered as well as when we used to make the carburet and put the carburet in. We discovered that using the carburet in the way I have described, would answer the same purpose as making the carburet first, about Michaelmas, 1839. We were making experiments all that autumn, and part of the next year too. I remember Mr. Heath's sending to different people packages of the paste containing the coal-tar and the manganese: I prepared it myself. He began to send those out in 1840. Very soon after we had made the discovery that that paste would answer, I sent some of the composition to Mr. Unwin, by desire of Mr. Heath. It was in 1840, I believe. I knew of Mr. Heath's addressing letters, and corresponding with Mr. Unwin at that time. I have seen Mr. Unwin's letters."

On cross-examination, the witness said:—"At first, I used the carburet of manganese, and put it into the pot. As soon as I discovered I could use the coal-tar \*and paste, without making the carburet [585 first, I abandoned the use of the carburet, finding the other much cheaper. It saves both heat and time. The expense of making a pound of carburet of manganese, is 7s. or 8s.: I mean, the whole expense, including wages, pot, coke, materials, and all other things. The expense of a ton of oxide of manganese and coal-tar, is about 7l."

Robert Warrington, chemical operator at Apothecaries Hall:—"In 1844, I received from the plaintiff's attorney a substance, in a packet. I submitted it to fusion: it yielded globules of carburet of manganese,—

a large button and a number of small buttons of carburet of manganese. The mixture was given to me to be submitted to fusion, to see what the result would be. I proceeded to Sheffield at the commencement of this year. Mr. Cooper was with me. We made a series of experiments. There were two distinct sets of experiments. The first set of experiments had reference to the formation of carburet of manganese, and to the effect of the oxide of manganese on the pot: and the second set had reference to the improved quality of steel by the use of carburet of manganese. The effect of the oxide of manganese alone upon the pot, was, that the pot was fluxed very rapidly: indeed, it was fused, not broken; it was melted through. We ascertained by that, that the oxide of manganese would destroy the pot. That destructive effect was prevented by the use of coal-tar. In the next set of experiments, we put oxide of manganese and coal-tar into the crucible, and nothing else. It was in a furnace with a pot by the side that was working steel. Each furnace was working two pots; and the experiment was made on one pot of those two in each case; so that the temperature of the working steel was maintained throughout. Carburet of manganese was made from the mixture, at the temperature at which steel was being \*536] worked: a mass of carburet of manganese was obtained from that pot, and the pot was not broken or fused. In the third experiment, each furnace contained two pots: the one pot contained steel, the other was empty. At the time of fluxing, the packet of manganese and coal-tar was put into the pot with steel, and a similar packet was put into a small crucible, and introduced into the large empty pot which was by its side. The small crucible was taken out: at the bottom of it was found a button of carburet of manganese. The object was, that the mixture of oxide of manganese and coal-tar should be in the furnace the same time only in both cases, one with the steel, and the other without the steel. That experiment satisfied me that carburet of manganese would be formed in both cases, the one mixed with the steel, the other by itself. The carburet of manganese would be formed in the melted steel, as it was formed in the pot by its side, where there was nothing but the two elements: it would be formed mixed with the steel. In that state of things, carburet of manganese would be employed in the manufacture of steel. The carburet of manganese would be first formed, and would immediately alloy itself with the steel: it would form a carburet before it would become mixed with the steel. I had never known the use of carburet of manganese in the manufacture of steel, before the date of Mr. Heath's patent."

John Thomas Cooper, a chemist of great experience:—"I went down to Sheffield with Mr. Warrington to make the experiments. We put oxide of manganese and coal-tar into a small pot, and oxide of manganese and coal-tar into the other pot where the steel was in the course of being melted. In the pot where there was no steel, we found a button

of carburet of manganese. I agree with Mr. Warrington in his opinion, that the experiments show that the carburet of manganese must have been first formed in the pot where the steel was, \*and that then the carburet of manganese entered into alloy with the steel. In [\*587 my knowledge of chemistry and the discoveries of chemists, I never heard of the use of carburet of manganese, or of the elements of carburet of manganese,—coal-tar and oxide of manganese,—in the manufacture of cast steel, before the date of Mr. Heath's patent; nor of the use of manganese in any way. I never heard of the application of the oxide of manganese to the same purpose, or of experiments being made with it."

On cross-examination, the witness said:—"I should conclude that carburet of manganese is formed as a substance before it is mixed with the steel; and, as soon as it is formed, the alloy of the carburet of manganese takes place with the steel. This is a conjecture: it is impossible to say how it could be otherwise. There are no means of ascertaining but by the thing being side by side; the carburet of manganese being introduced into the pot where it is formed, at the same time that it is put into the steel pot. The inference I should make from that, is, that, in the one case, the carburet of manganese was formed, and, as soon as it was formed, it alloyed with the steel, and, in the other case, it went down to the bottom of the pot. When the steel is melted, the melting steel is heated up to more than enough to reduce the manganese to the metallic state,—the state of carburet; and, as soon as the carburet is formed, it is fluxed, and goes into the steel. That is the inference I should draw; and there are no means I am aware of, from whence it could otherwise be obtained. The manganese must be melted itself, before the reduction takes place. When the oxide of manganese is put into the pot by itself at a very high heat, it melts, and, in its melted state, has a great affinity for the earthy matters of the pot, and they will fuse together into a form of glass, and the pot is either cracked or cut \*through. When the carbon is present, [\*538 the carbon takes the oxygen from the oxide of manganese, the manganese is reduced to a metallic state, or a state of carburet, in which it has no action whatever on the pot. You have an analogy in the case of lead."

Dr. Ure deposed as follows:—"I am a fellow of the Royal Society, and a professor of chemistry. In my opinion, the carburet of manganese would be formed before it would mix with the steel. Oxide of manganese alone, would destroy steel, instead of combining with it: it would oxidize and destroy it. Carburet of manganese will combine perfectly. Before the date of Mr. Heath's patent, I never knew of the use of carburet of manganese, in the manufacture of steel. I have been intimately acquainted with the application of chemical science for the last fifty years."

Professor Brande stated:—"I have heard the evidence of the experi-

ments; and I have no doubt, that, in the first instance, the oxide of manganese and the coal-tar mutually act upon each other, so as to produce a carburet of manganese, and that then that carburet of manganese combines with the steel. The cast-steel is equally improved, whether you introduce the mixture as a carburet in the first instance, or use the ingredients which form a carburet, and then enter into combination with it: the result is equal. I imagine, that, in any case in which there is an alloy formed between the steel and the carburet of manganese, the carburet of manganese must be first formed by some process or other."

It was admitted, on the part of the defendant, that the substance or composition received by Mr. Warrington from the plaintiff's attorney, as above stated, was received by the latter from the defendant, and that it consisted of oxide of manganese and carbonaceous matter. It was also admitted, that, since the date of the patent, the defendant \*539] had manufactured cast-steel, by using \*oxide of manganese and carbonaceous matter, introduced into the pot at the same moment with the steel,—the said three ingredients, oxide of manganese, carbonaceous matter, and steel, being introduced all at once, but each of the said ingredients being, at the time of such introduction, separate and apart from, and not in combination with, any of the others; and also, that, since the date of the patent, the defendant had manufactured cast-steel, by using only oxide of manganese with highly carbonized steel,—the said oxide of manganese and highly carbonized steel being introduced separately into the pot at the same time.

Professor Brande, being re-called, stated:—"I should think, that, if the steel were highly carbonized, it is barely possible that a carburet of manganese would be formed, at the expense of the carbon in the steel; but my apprehension would be, that, before the carburet of manganese could have been so formed, the oxide of manganese would have had time to act upon the crucible. If the crucible were protected by some lining of charcoal or other carbonaceous matter, a carburet of manganese would no doubt be formed: the oxide would act upon the lining, and form a carburet. I imagine, that, in any case in which there is an alloy formed between the steel and the carburet of manganese, the carburet of manganese must be first formed by some process or other: if the steel were very highly carbonized, I think it probable, that, at a high temperature, the carburet of manganese might be formed, which, combining with the steel, would produce the same effect as if carburet of manganese itself had been originally added. The oxide of manganese would not combine with steel, unless it were converted into a carburet, or reduced or otherwise changed by the presence of carbonaceous matter: the only way such an action would take place would be, by the carbon reducing the manganese to the \*metallic state, and then the metal manganese itself would possibly combine with the steel: [\*540

but, inasmuch as manganese has a very strong affinity for carbon, it is not likely under those circumstances such a change should take place, but that a carburet would be formed, and then that combine with the steel."

It was insisted on the part of the defendant, that there was *no* evidence of infringement by the defendant of the plaintiff's patent.

The learned judge directed the jury that there was no evidence of infringement, and that therefore they ought to find a verdict for the defendant upon the first issue.

The counsel for the plaintiff excepted to this ruling, insisting that there was evidence to go to the jury that the defendant had used the plaintiff's invention, and thereupon tendered a bill of exceptions, which was brought by writ of error to the Exchequer Chamber.

The case was argued in Easter Vacation last, before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Platt, B., and Crompton, J., by Sir A. Cockburn (with whom were *Bramwell* and *Webster*) for the plaintiff, and T. Jones (with whom was *Deighton*) for the defendant. The arguments sufficiently appear in the judgments, which, there being a difference of opinion amongst the learned judges, were delivered seriatim. The only case which was cited on either side was *Barber v. Grace*, 17 Law Journ. N. S. Exch. 122.

CROMPTON, J.—This was an action for an infringement of a patent. The only question which is now material to be considered, arose at the trial on the plea of not guilty; and the learned judge who tried the cause directed the jury, according to the decision of the Court of Exchequer in a previous case between the same parties, \*that there was no evidence of infringement.<sup>(a)</sup> A bill of exceptions was [\*541 tendered against this direction; and we have now to consider whether there was any evidence of infringement which ought to have been submitted to the jury.

For the present purpose, we must assume that the invention patented was novel and useful; and the only question is, whether there was any evidence of infringement to go to the jury. It will be first necessary to see what the invention consists of.

The patentee, after mentioning other inventions which are not material, declares his invention to be, the use of carburet of manganese in any process whereby iron is converted into cast-steel. In the subsequent part of his specification, he states what that operation is, as follows:—[His lordship read it.] He states his claim, with reference to this invention, to be, the employment of carburet of manganese in preparing an improved cast-steel. The two substances are to be placed together, forming (as proved by the evidence) alloy. This being the invention, one mode of carrying it out is particularized in that part of the specification in which the patentee specifies his *modus operandi*,

(a) See *Heath v. Unwin*, 13 M. & W. 583.†

and shows how he brings the two substances together by introducing them into the same crucible. It is important to distinguish between the invention and the particular mode of working it described in the patent. There may be other modes than that pointed out by the patentee, of bringing the two substances together, which would, I apprehend, be an infringement of the patent, if they involved the use of carburet of manganese in the process of the conversion of iron into cast-steel. The question is, whether what the defendant was proved to have done, was not evidence of the use of carburet of manganese in the \*542] process of the conversion of iron into cast-steel, \*although the operation was carried on in an improved mode, different from that described in the specification, and originally adopted by the plaintiff.

It appeared from the evidence, that the plaintiff had first worked his patent by preparing the carburet of manganese, and by then using the carburet so prepared in the process of converting the iron into steel, in the manner described in the specification. He afterwards found that the same advantage was obtained by taking oxide of manganese and coal tar, and putting them into the crucible in which the steel was melted: and witnesses in the employ of the plaintiff stated that he discovered that the using of carburet in the way I have described would answer the same purpose as making the carburet first.

Strong evidence was given by several scientific witnesses, that, when the coal-tar and the oxide of manganese were put into the crucible, a carburet of manganese was formed from them before the melting of the steel. They said the carburet of manganese would be first formed, and would immediately alloy itself with the steel, and that the carburet would be formed at a lower temperature than that at which steel was melted; and they said, in this way, when the carburet of manganese was employed in the manufacture of steel, it was an improved process.

It appeared that the plaintiff had been in the habit of making up coal-tar and manganese into packets, to be used in the new method. Some of these packets had been supplied by him to the defendant. The defendant was admitted to have manufactured cast-steel, by using the oxide of manganese and carbonaceous matter introduced into the pot at the same moment with the steel. I think that this was evidence of using carburet of manganese in the process of converting iron into steel, and was evidence of a direct infringement of the patent. It \*543] \*was a neater mode of carrying out the invention, by making the carburet in the crucible instead of preparing it out of the crucible, and then introducing the carburet and iron into the crucible together; and, in both operations, the two substances are brought together, and the alloy is formed. The question does not seem to me to be one of imitation or of equivalent, but whether there is not evidence of the direct use of the carburet for the purpose of manufacture,

though in a neater mode than that described in the specification. I do not agree with the suggestion that the invention was, the putting the two substances in the crucible together in the exact manner pointed out by the plaintiff: but I think that the discovery claimed, is, the use of the carburet in the manufacture, and that it is not limited to the mode of working mentioned in the specification, which, I think, the plaintiff gives merely as a means of working his invention.

The discovery of the new mode of making the carburet in the pot, in the course of the process, so as to be ready to alloy with the steel in a subsequent part of the process, may have been a discovery, and an improvement on the plaintiff's invention, for which a patent might perhaps have been taken out, and, if taken out by a stranger, the plaintiff could not have used the new method, without infringing the patent for the improvement. On the other hand, the new method could not in such case have been carried on without infringing the plaintiff's patent, if, as I think, it was an improved and neater mode of bringing the two substances together,—being a use of carburet in the state of carburet in the manufacture of steel. I do not attribute any weight to the fact of the plaintiff himself being the discoverer of the new mode, or of the defendant having had it communicated to him by the plaintiff. However much these facts might affect the moral justice of the case, they do not \*seem to me to alter the law. If the new plan was a distinct invention, the defendant might have used it, whoever was [544 the inventor. If, on the other hand, it was the use of carburet in the process of manufacture, it would be an infringement of the plaintiff's patent, even if the defendant himself had invented the improvement.

I think there was abundant evidence from which the jury might infer, that, in the new method, the carburet was first formed in the crucible from the materials, so as to be in the distinct state of carburet before the use of it in the manufacture of steel commenced, and that, after its formation, it was used as a carburet of manganese in the process of converting the iron into steel; and I think, that, from such state of facts, it was competent for the jury to find that the patent had been infringed by the defendant.

I think that the judgment should be reversed, and a venire de novo awarded.

PLATT, B.—This was an action on the case charging the defendant with an infringement of the plaintiff's patent; and, on the issue joined on the plea of not guilty the learned judge directed the jury at the trial that the matters deposed to by the plaintiff's witnesses were not evidence of that infringement. The plaintiff having excepted to that direction, and brought his writ of error, the question arises, whether, on the matter adduced in support of the plaintiff's case on the trial, there was such evidence.

It appeared that the plaintiff's patent was for an improvement in



the manufacture of steel, by the use of carburet of manganese in the process of converting iron into that metal. By the specification, the plaintiff claimed as part of his invention, the use of carburet of manganese in any process whereby iron was converted into cast-steel; and \*545] he described the mode by which he \*obtained fine cast-steel from simple iron, by the use of carburet of manganese.

It was admitted at the trial, between the plaintiff and the defendant, that since the date of the patent, the defendant had manufactured cast-steel, by using oxide of manganese and carbonaceous matter, introduced into the melting-pot at the same moment with the steel; the three ingredients,—oxide of manganese, carbonaceous matter, and steel,—being, however, separate and apart, and not in combination with either of the others. It is also admitted, that, since the date of the patent, the defendant had manufactured cast-steel, by using only, I think, oxide of manganese and highly carbonized steel, introduced separately into the pot at the same time: and the testimony of chemists at the trial tended to show, that, in each of these two processes, carburet of manganese would be formed, and would become the active means of effecting the improved manufacture.

Surely, whether the carburet or its constituent parts separately are put into the melting-pot, could not make any difference, if those parts, afterwards combined, and in their combined state, acted in the same manner on the subject of the manufacture. By the defendant's selection of substances he put into the melting-pot, he collected together oxygen, carbon, and manganese. The relative affinities sufficed to lead to the natural expectation that they would, on the application of the proper heat, combine, and in that combination form the carburet required. This may constitute a different manner of manufacturing carburet of manganese; but, however manufactured, if the defendant used it in the conversion of iron into cast-steel, he, in my judgment, infringed the patent.

Whether the chemical testimony was credible or not, is not a matter for our consideration. We are required to consider and determine \*546] whether, coupled with the \*admissions on the trial, it was evidence, and evidence to be left to the jury, of the defendant's having used carburet of manganese in the process for the conversion of iron into cast-steel. I think it was; that the ruling of the learned judge was incorrect; and that a venire de novo should be awarded.

ERLE, J.—In this case the question is, whether there was any evidence of an infringement of the plaintiff's patent for the use of carburet of manganese in the process of converting iron into cast-steel: and there was evidence that the defendant, by heating the elements of carburet of manganese with iron, formed, first the carburet, and then cast-steel. If this be true, the defendant would, in my judgment, be guilty of a direct infringement. But, assuming this to be doubtful, there was also evidence that he had indirectly infringed this patent for the use of a substance in

a process, by the use of a known chemical equivalent for that substance in that process. At the time of the patent, the patentee made the carburet by heating the carbon and manganese till it was formed, and then heated the carburet with iron, to form the cast-steel. He *afterwards* discovered, that, if the elements of the carburet were heated with the iron, the same result would be obtained, and one heating would be saved. He communicated the effect of this discovery to the defendant, by selling to him the paste containing the elements of the carburet to be so used.

The patentee knew, *at the time of the patent*, the elements from which he formed the carburet, and, from that knowledge, was induced to use those elements as equivalent to the substance mentioned in the specification.

There was, thus, some evidence that the defendant infringed, by the use of a chemical equivalent for the \*patented substance, known [\*547 to be so at the time of the patent.

But I am further of opinion, that a patent for the use of a substance in a process, is infringed by the use of a chemical equivalent for that substance, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colourable variation therefrom. Taking the instance put in the argument of this case in the Exchequer,—if a patent was for the use of soda in a process, and, by subsequent analysis, sodium and oxygen were discovered to be the elements of soda, the use of sodium and oxygen in the patented process, for the purpose of being an equivalent to soda in that process, would appear to me to be an infringement, though the analysis of soda was subsequent to the patent.

Upon these grounds, it appears to me that there ought to be a *venire de novo*.

WIGHTMAN, J.(a)—I cannot come to the conclusion that there was no evidence for the jury in this case, that the defendant in the action had infringed the plaintiff's patent; and, if there is any, the plaintiff is entitled to judgment upon this bill of exceptions, for a *venire de novo*.

The action was on the case for infringing a patent for "certain improvements in the manufacture of iron and steel." The defendant pleaded not guilty, and several other pleas; but the question arises upon the plea of not guilty.

The plaintiff, in his specification, declared that one of his improvements was, "in the use of carburet of manganese in any process whereby iron is converted into cast-steel;" and he claims that as his invention.

\*It appears by the evidence, that the use of carburet of manganese in the manufacture of steel was unknown before the plaintiff's invention, and that it was a most important improvement. [\*548

In the specification, the plaintiff states the mode in which he applies

(\*) The learned judge being absent on account of indisposition, his judgment was read by Coleridge, J.

the carburet of manganese to the iron or steel: but states expressly that all he claims as his invention, is, the *use of the carburet* in any process for the conversion of iron into cast-steel.

It appears by the evidence, that the carburet may be applied in three ways,—one, by making the carburet first, and then introducing it into the melting-pot with the iron or steel to which it is to be applied; and this is the mode stated in the specification,—another, by putting the ingredients which are to form the carburet into the pot at the same time with the iron or steel; in which case the carburet is formed in the pot, before it acts upon the iron or steel; and this mode was adopted by the plaintiff subsequently to the patent specified,—and, thirdly, by putting oxide of manganese into the pot with steel so highly carbonized, that, at a high temperature, carburet of manganese would be formed, and produce the same effect upon the steel as if either of the other processes were used.

It was admitted that the defendant had adopted both of the last modes of using carburet of manganese in the manufacture of steel.

In each of the three modes, the same materials are used, and the effect is produced by the same means, namely, the action of carburet of manganese upon iron.

The materials are the same in each,—iron, manganese, and carbonaceous matter; which two latter must unite before they act upon the iron: and in all the three the union of the carbon and manganese takes place before the united substance acts upon the iron.

\*549] \*The mode adopted by the defendant is not by using chemical equivalents; the materials and combinations are the same with those of the plaintiff, with this difference, that his carburet is formed in the same pot in which the iron is, and that, by the plaintiff's specification, the carburet is formed *before* it is put into the pot; but in both the carburet must be formed before it can act upon the iron.

By the mode adopted by the defendant,—and which, indeed, the plaintiff had himself adopted,—one heating suffices for the whole process; whereas, by the mode in the specification, the oxide of manganese and carbon must first be converted into carburet, by the action of one fire, and then there must be another fire to produce the action of the carburet upon the iron.

The plaintiff's patent, however, is not for the mode of preparing the carburet of manganese, but for the use of it in any process whereby iron is converted into cast-steel. The process by which the defendant makes his carburet, may be an improvement upon that mentioned in the specification; but, *when made*, he uses it for the same purpose, and for the same effect, as the plaintiff. Both plaintiff and defendant operate upon the iron, and produce the same effect upon it, by the same agent, viz. carburet of manganese: and it is for the operation of that agent upon

iron, in the process of converting it into steel, that the defendant has taken out his patent.

I think, therefore, that there was evidence for the jury, that the defendant had infringed the plaintiff's patent; and that there should be a *venire de novo*.

COLERIDGE, J.—The only question in this case, is, whether there was any evidence for the jury of an infringement of the plaintiff's patent; and this must be considered on the assumption that the plaintiff's specification was unexceptionable,—a condition which it [\*550] will be found very important to bear in mind in the examination of the evidence.

Limiting myself to all that is in question in the present case, I may state that the specification, to be perfect, must be taken to specify impliedly all the chemical equivalents to the chemical means expressly stated, for producing the promised result, which were at the time of specifying known to ordinarily skilled chemists, or to the patentee himself. The latter of these seems to me as necessary as the former. If the inventor of an alleged discovery, knowing of two equivalent agents for effecting his end, could, by the disclosure of one, preclude the public from the benefit of the other, he might, for his own profit, force upon the public an expensive and difficult process, keeping back a cheap and simple one; which would be directly contrary to the good faith required from every patentee in his communication to the public.

Now, the patentee thus describes the process which he claims:—"I do it by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then declares that he does not claim the use of the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of carburet of manganese in any process for the conversion of iron into cast-steel. And, in the final enumeration of his claims, he repeats,— "I claim the employment of carburet of manganese in preparing an improved cast-steel."

This being the specification and claim, it appears now upon the evidence, that the same result may be produced as certainly, and far more cheaply, by substituting for the carburet of manganese oxide of manganese and \*coal-tar (a carbonaceous matter), which being [\*551] thrown into the crucible with the iron, forms, there is strong ground for believing, carburet of manganese before the iron is in a state of fusion, and before, therefore, any mixture of the two takes place. The difference is, that instead of the formed composite substance being thrown into the crucible in certain proportions to the iron and carbonaceous matter, the ingredients of such substance are introduced, which, in one and the same process, but in an earlier stage of

it, form the composite, which then applies itself to the iron, and produces the desired result.

There can be no doubt, then, I think, that an equivalent has been used. If that equivalent were known, at the date of the specification, to the patentee, or ordinary chemists,—those I mean who could bring to the reading of the specification such knowledge as must be presumed in those to whom it must be taken to be addressed,—then it is within the specification, and the use of it is an infringement: if not, a contrary conclusion follows, and the use of it is an improvement in virtue of a new discovery. And the knowledge I speak of, is, of course, not the knowing what were the component parts of carburet of manganese, but knowledge that the component parts thus applied were equivalents to the thing itself, applied according to the specification, for the producing the desired result.

This limitation seems to me required by common sense and common justice: unless it be imposed, I see no means of knowing whether the later process is or is not within the specification; and, unless I know that, I have no means of distinguishing improvement from infringement. Whether the equivalent be in its nature near to or remote from the thing itself, seems to me, in principle, wholly immaterial; and, equally so, \*552] \*themselves the component parts may be with the composite substance. The new conclusion may be deducible from known and specified premises, and in strict reasoning, therefore, involved in them: still, he who first puts the premises side by side, and deduces the conclusion, is the inventor. Many of the greatest and most unquestioned discoveries resolve themselves into no more than this.

Having applied these principles to a careful examination of the evidence, I cannot perceive that there was any to show either that chemists or the patentee himself, at the date of his specification, had any knowledge of the equivalent which the defendant has used; though there is evidence, that, at a later period, the defendant may have gained the knowledge from the plaintiff himself.

I think, therefore, that the ruling of the learned judge at the trial was correct, and that judgment ought to be affirmed.

ALDERSON, B.—The first question is, I think, what really is the invention described and claimed by the plaintiff in his specification. He describes the process thus:—"I do it by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." And he adds, that he claims the use of carburet of manganese in any process for conversion of iron into steel.

Now, we are aware that carburet of manganese was a well-known substance existing before the patent. As the specification describes it

as being introduced into the crucible with the steel or iron, and as it is to be introduced at a given proportion of weight with the steel or iron, I do not myself see how any language could more \*accurately [\*553 express to those who read it, that the patentee really meant to take two existing substances, to weigh them, to take their definite proportions of weight the one to the other, and then, introducing these definite proportions of carburet of manganese and of steel into the crucible, to proceed to melt them together. If the words can mean anything else, it is quite out of my power to conceive it. And then I think, if this be established, it follows that all that the patentee has claimed and specified, is this which I have described.

But I fully agree also, that, according to the due administration of the patent law, every specification is to be read as if by persons acquainted with the general facts of the mechanical or chemical sciences involved in such inventions. Thus, if a particular mechanical process is specified, and there are for some parts of it, as specified, other well known mechanical equivalents, the specifying of those parts is, in truth, a specification of the well known equivalents also, to those whose general knowledge we refer to, viz. mechanics, readers of the specification. And so it is with chemical equivalents also, in a specification to be read by chemists.

But it may be that there are equivalents, mechanical or chemical, existing, but previously unknown to ordinarily skilful mechanics or chemists. These are not included in the specification, but must be expressly stated therein. These are, in fact, new discoveries in themselves, wholly independent of the specification which omits them; and for these there is no patent or specification at all. They may be used by all persons, without infringing the patent.

These are the principles upon which I hold that this question must be determined, and which we must look to, and be governed by, when we answer the question here, whether there is any evidence of the infringement \*of this patent by the defendant. And I propose, [\*554 therefore, referring myself to them, to consider the evidence which has been given, and which is stated on this record.

It is clear that there is no evidence that the defendant melted carburet of manganese with broken steel or iron, by taking each of those substances, existing in a separate state, and putting them into a crucible, and then applying heat. He has not, therefore, directly and in terms infringed the patent.

But I have before shown that an infringement may be, if the defendant uses a known chemical or mechanical substitute, equivalent to the very thing pointed out; for, the equivalent being known, and a part of the general knowledge of the world, he who by his specification describes the ingredients which he uses, describes impliedly also all their known equivalents, and so does, in fact, communicate to the world by

his specification the knowledge of the invention; and on this knowledge thus expressly or impliedly communicated, he who afterwards infringes the patent really acts. But this depends on the equivalent being *a known one before*.

If the equivalent be not before known, he who discovers *de novo* the equivalent (if it be better than the original for which it is the equivalent), has, by the use of the equivalent, improved upon, not infringed, the original invention. That is the case here. The carburet of manganese is to be taken and melted with the broken steel or iron. This is the invention. An improved steel is the result. Now, carburet of manganese is an expensive ingredient, produced, by an additional process, from oxide of manganese and carbon. There is no evidence that the oxide of manganese and carbon were known to be, at the time of the specification,—*which time, and not the time of the use, is the material time to* \*555] *look at*,—exactly, and under all circumstances, an equivalent in \*chemistry for carburet of manganese. They did produce it; but only after being subjected to a special process, which was expensive. But it is now found, that, by putting these ingredients, with broken steel or iron, into a crucible, they produce the same effects when melted as the carburet of manganese with broken steel or iron did before: and, this fact existing, a scientific reason is to be found for it. It is said now, therefore, that these ingredients, melted together at a lower heat than will melt steel or iron, do in the crucible first form carburet of manganese, and then, there being carburet of manganese formed and existing in the crucible, *with unmelted steel or iron*, the subsequent melting of those two ingredients together forms the good steel.

It seems clear that this *order* of formation in the crucible is of the essence as to the success of the operation, and that this order of formation under these circumstances was utterly unknown at the time of the patent and specification.

I agree that there is now abundant evidence to show that these materials, thus treated, do form an equivalent, chemically, for the carburet of manganese; though the evidence fails altogether, even now, as to the existence of the two substances in definite proportions in the crucible, such as are mentioned in the specification. But I can find no evidence whatever on the record, that, *at the time of the plaintiff's patent and specification, this was well known to persons ordinarily skilled in chemistry*. And, unless this fact be added, I think there is no evidence for the jury of an infringement of that peculiar process which by his specification the plaintiff has claimed to be his invention; for, the specification by which he does state his invention, does not communicate, if read by any ordinarily skilled chemist of that day, the knowledge, that, to melt together in a crucible, carbon, oxide of \*556] manganese, and broken steel or iron, is really \*the same thing as to melt in a crucible carburet of manganese with broken steel

or iron. The plaintiff did not then know it: nor did any one else *then* know it. If they know it now, it is in consequence of a new discovery alone, for which no patent has been taken out, and no specification enrolled.

I apprehend nothing is an equivalent now, which would not have been one immediately after the specification was enrolled. The knowledge of the equivalents must be the knowledge the world had before these experiments, now called infringements, were first made.

I think the judgment should be affirmed; but, as the majority of the court are of a different opinion, the judgment must be reversed, and a venire de novo awarded. Venire de novo.(a)

(a) Upon this judgment, *Unwin* brought a writ of error returnable in parliament, which now stands for argument. In the mean time, the validity of Heath's patent has been the subject of inquiry in another action in the Court of Queen's Bench,—*Heath v. Unwin*, tried at the Summer Assises at Liverpool, 1852,—wherein a verdict was found for the defendant, on the ground that the invention was not new, and a rule for a new trial as for a verdict against evidence, which was granted in Michaelmas Term following, was afterwards, in Hilary Term, 1853, discharged.

Actions, however, against other parties are still pending.

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\*The Wardens and Commonalty of the Mystery of FISH-MONGERS of the city of LONDON v. DIMSDALE and Others. June 15. [\*557]

On the 17th of March, 1838, an agreement was executed in counterpart, each part being duly stamped with a 35s. stamp, between the plaintiffs and the defendants. Two or three weeks afterwards, a memorandum was endorsed upon each part of the agreement, for the purpose of more accurately defining the intention of the parties,—the memorandum endorsed on the part of the agreement which was in the defendants' possession being signed by the plaintiffs' attorney, and being stamped with a 35s. stamp,—that endorsed on the part of the agreement in the plaintiffs' possession being signed by the defendants' attorney, and stamped with a 20s. stamp.

At the trial the plaintiffs called for and read the agreement which was in the hands of the defendants, with the memorandum endorsed thereon. They then produced their part of the agreement, and (after proving the authority of the attorney who had executed it) read the memorandum endorsed on it; and then they proposed to read the *agreement*, which the memorandum referred to as "the within-mentioned agreement." It was thereupon objected, on the part of the defendants, that, inasmuch as the agreement was thus incorporated in the memorandum, and both together contained more than fifteen folios, a 35s. stamp upon the memorandum was necessary,—in the absence of proof of the agreement it referred to, by calling the attesting witnesses: and the judge ruled that it was inadmissible.

Held, upon exceptions to that ruling, that the last-mentioned memorandum was sufficiently stamped, and the agreement it referred to admissible in evidence without calling the attesting witnesses.

**ASSUMPSIT.** The first count of the declaration stated, that, theretofore, and before and at the time of the making and entering into the articles of agreement thereafter in that count mentioned and set forth, a petition had been presented to the honourable the House of Commons, and was then pending, at the instance and on behalf of the defendants, that is to say, for leave to bring into the said House of Commons a bill for draining, embanking, and reclaiming certain slob or waste lands in



Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry, in Ireland: That the plaintiffs, before and until and at the time of the making of the said articles of agreement thereafter next mentioned, had opposed, and were then opposing, and objected to the bringing in and passing of such bill: That also one Robert Ogilby at those times also objected to and opposed the introduction of the same

\*558] bill, \*separately and apart from the said plaintiffs, and on his own behalf: That also, theretofore, to wit, on 17th of March, 1838, by certain articles of agreement in writing then made and entered into by and between J. D. Towse, for and on behalf of the plaintiffs, therein described as, &c., of the first part, T. G. Kensit, for and on behalf of the said Robert Ogilby, of the second part, and the defendants of the third part,—after reciting that a petition had then lately been presented to the honourable the House of Commons at the instance and on behalf of the defendants, the parties thereto of the third part, for leave to bring in a bill for draining, embanking, and reclaiming the slob or waste land in Lough Swilly and Lough Foyle, in the said counties of Donegal and Londonderry (being the said petition thereinbefore mentioned), and that certain proceedings had been thereupon had; and that the plaintiffs and the said Robert Ogilby were then respectively seised, possessed of, or otherwise entitled to certain lands abutting upon or adjacent to certain parts of the said slob or waste land in Lough Foyle aforesaid, and in respect of such lands then were or claimed to be entitled to the said slob or waste land adjacent thereto, and to certain rights and privileges in, over, and upon the same; and also reciting that the plaintiffs and the said Robert Ogilby then objected to the said intended bill, and the powers and authorities thereby sought to be obtained, as injurious to their said respective rights, and had by their agents opposed the proceedings necessary for the introduction thereof into parliament (being the said opposition by the plaintiffs and the said Robert Ogilby respectively thereinbefore mentioned),—it was by the said agreement, for the purpose of preventing the expense of further opposition to the said intended bill, and for settling and adjusting the rights of the plaintiffs and Robert Ogilby respectively to the said slob or waste land so sought to be reclaimed, mutually agreed by and

\*559] \*between the said parties to the said agreement, and they did thereby mutually agree each with the other and others of them, in manner following, that is to say [setting out the agreement: vide post, 560]: That, theretofore, and after the making of the said articles of agreement, to wit, on the said 17th of March, 1838, by a certain memorandum then written and endorsed on the said articles of agreement, by and with the consent and approbation of all the said parties to the said articles of agreement, and then signed by one J. M. Pearce, as the solicitor and agent of the said defendants, it was and is declared to be understood, &c. [setting out the memorandum: vide post, 564]:

The declaration then proceeded to allege mutual promises, and to aver performance of the agreement on the part of the plaintiffs and Robert Ogilby, and alleged for breaches, amongst others, non-payment of the 1000*l.*, and the failure to return the maps, plans, and valuations, and also non-payment of the necessary costs incurred by the plaintiffs in their endeavours to promote the progress of the bill in parliament.

The defendants severed in pleading. The only plea which was material for the present purpose was, the plea of non assumpsit pleaded by the defendant Staines.

The case had been before the Court of Common Pleas on two former occasions,—see *The Fishmongers' Company v. Robertson*, 5 M. & G. 131 (E. C. L. R. vol. 44), 5 Scott, N. R. 56, 112, 117, 1 C. B. 60 (E. C. L. R. vol. 50), and before this court in Michaelmas Vacation, 1848, upon exceptions to the ruling of Tindal, C. J.,—*The Fishmongers' Company v. Dimsdale*, 6 C. B. 896 (E. C. L. R. vol. 60). The defendant Robertson had died pending the proceedings.

The issues joined between the plaintiffs and the defendants Dimsdale, Stedman, Staines, Edge, and Whiskin, came on for trial before Jervis, C. J., at the sittings in London after Michaelmas Term, 1850.

\*The plaintiffs proved and read in evidence a paper writing purporting to be one part of an agreement, as follows:— [\*560

“Articles of agreement made and entered into this 17th of March, 1838, between John David Towse, of, &c., for or on behalf of the Wardens and Commonalty of the Mystery of Fishmongers of the City of London, commonly called the Fishmongers' Company, of the first part, T. G. Kensit, of, &c., for and on behalf of Robert Ogilby, of, &c., of the second part, and John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and William Whiskin, of the third part:

“Whereas, a petition has lately been presented to the honourable the House of Commons, at the instance and on behalf of the said parties hereto of the third part, for leave to bring in a bill for draining, embanking, and reclaiming the slob or waste land in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry, and certain proceedings have been thereupon had: And whereas, the said Fishmongers' Company and the said Robert Ogilby are respectively seised, possessed of, or otherwise entitled to certain lands abutting upon or adjacent to certain parts of the said slob or waste land in Lough Foyle aforesaid, and, in respect of such lands, are, or claim to be, entitled to the said slob or waste land adjacent thereto, and to certain rights and privileges in, over, and upon the same: And whereas, the said Fishmongers' Company and Robert Ogilby object to the said intended bill, and the powers and authorities thereby sought to be obtained, as injurious to their said respective rights, and have by their agents opposed the proceedings necessary for the introduction thereof into parliament: Now,

for the purpose of preventing the expense of further opposition to the said intended bill, and for settling and adjusting the rights of the said

\*561] \*Fishmongers' Company and Robert Ogilby respectively to the said slob or waste land so sought to be reclaimed, it has been mutually agreed by and between the said parties to these presents, and they do hereby mutually agree each with the others and other of them, in manner following, that is to say,—That the said Fishmongers' Company and the said Robert Ogilby shall respectively withdraw all opposition to the further progress of the bill to be brought into parliament and promoted by the said parties hereto of the third part, for draining, embanking, and reclaiming the said slob or waste land in Lough Foyle aforesaid: That the several powers and authorities to be granted by the said bill, and the several clauses, provisoes, restrictions, and stipulations therein to be contained, shall be agreed upon and settled by and between the solicitors of the said parties hereto, before any proceedings shall take place thereupon in committee of either House of Parliament, to the intent, and with the object, that the said bill might be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it can be made; and that if, in framing and perfecting the said bill, any difference or dispute shall arise between the said parties, or any of them, in regard to any clause, matter, or thing which any of the said parties may desire to insert or have omitted in the said bill, such difference or dispute shall be referred forthwith to P. B. Brodie, Esq., for his opinion and determination, which shall be final and conclusive on the said parties: That the said Fishmongers' Company and Robert Ogilby respectively shall by petition or otherwise, at the expense of the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, use all reasonable means and endeavours to promote the progress of the said bill, and

\*562] procure an act of parliament to pass thereupon: That \*such part of the said slob or waste land as is opposite to the said Fishmongers' Company's estate, bounded by the canal on the one side, and by Mr. Maxwell's property on the other, and extending to the site of the proposed embankment as laid down in Mr. M'Neill's plan, shall be allotted and given to the said Fishmongers' Company: That a proportion equal to one-tenth part in the whole of the slob or waste land opposite to the frontage of the lands of the said Robert Ogilby, which shall be reclaimed under the powers of the said intended act, shall be allotted and given to the said Robert Ogilby,—such proportion of the said slob or waste land to be part of the slob opposite to such frontage as aforesaid, and to be selected by the said Robert Ogilby and the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, with due regard to the convenience and interest of the said Robert

Ogilby, so far as the same can be accomplished consistently with an arrangement for the cession of further portions of the said slob, entered into by the said Thomas Isaac Dimsdale with certain other persons; it being understood that such arrangement is not to affect or prejudice any right of the said Robert Ogilby: That such respective allotments or proportions shall be absolutely reserved in the said intended act to the said Fishmongers' Company and their successors, and to the said Robert Ogilby and his heirs, respectively, free and indemnified of and from and against all costs, charges, and expenses attending the embanking, draining, and reclaiming the said slob, or any other charge, stipulation, restriction, or condition whatsoever: And the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, do hereby undertake and agree that they will, on the passing of the said intended act, pay to \*the said Fishmongers' Company the sum of 1000*l.*; and that the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, shall and will pay all costs and expenses of and attendant upon the application for and obtaining the said act: And, lastly, it is agreed by and on the part of the Fishmongers' Company and the said Robert Ogilby, that the aforesaid proportions or allotments of the said slob or waste land, when reclaimed, which shall be allotted to them respectively as aforesaid, shall be received and taken by them respectively in full of all rights and claims of the said Fishmongers' Company and the said Robert Ogilby respectively, or any of their respective tenants claiming from or under them or him, in respect of the said slob or waste land; and that the said Fishmongers' Company and the said Robert Ogilby respectively will protect and indemnify the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, from and against any right or claim derived from or under the said Fishmongers' Company and the said Robert Ogilby respectively, which shall or may be made by any of their said tenants respectively, in, to, or upon the said slob or waste land, or any part thereof, save and except as to any contract or engagement which may have been entered into by the said John Robertson, Thomas Isaac Dimsdale, John Gyllyatt Booth, Francis Stedman, Francis William Staines, Thomas Edge, and James Whiskin, or any or either of them, with the said tenants respectively, or any or either of them, in respect thereof.

"Witness,

"Thomas Hughes."

(signed) "J. D. TOWSE.

"T. G. KENSIT."

The plaintiffs then further proved and read in evidence a certain memorandum in writing endorsed on the \*said last-mentioned part of the said agreement, and which was as follows:—

[\*564

"Memorandum. It is understood between the parties within named, that the within-mentioned Wardens and Commonalty and the said Robert Ogilby are only severally, and not jointly, held and bound for the fulfilment of the within-mentioned agreement on their own respective parts, but not for each other; and that the sum of 1000*l.* within mentioned to be paid to the said Wardens and Commonalty, is for certain costs and expenses which they the said Wardens and Commonalty have been put to during the present year, partly in the survey made by Mr. M'Neill, and for his plans and valuations, which survey, plans, and valuations the several persons within named to be parties of the third part are to have the benefit of; but that they are to be forthwith returned to the said Wardens and Commonalty, if the said sum of 1000*l.* shall not be duly paid as within mentioned: and it is also agreed that the within-mentioned agreement for withdrawing the opposition, and facilitating the bill, as within mentioned, shall only be and remain in force for the present session of parliament, 1837 and 1838.

"Witness,

(signed) "J. D. TOWSE.

"Thomas Hughes."

"T. G. KENSIT."

The plaintiff further proved, that the first-mentioned paper writing or agreement, and also the memorandum, were respectively engrossed in two parts, and that one part of the said agreement, being the part so proved as aforesaid, was signed on the date thereof by Towse and Kensit, and that one part of the memorandum, being the part so proved as aforesaid, was signed two or three weeks afterwards, by Towse and Kensit, and that such parts were delivered to one Pearce, an attorney, to be kept by him on behalf of all the defendants,—the other parts of \*565] the first-mentioned paper writing or agreement, \*and of the memorandum, having been delivered to the plaintiffs. And the plaintiffs then produced out of their own custody at the trial, and identified, the duplicate engrossment or other part of the said paper writing or agreement, and also the duplicate engrossment or other part of the said memorandum, and which was endorsed on the last-mentioned part of the said agreement, on the same sheet of paper, and signed by Pearce.

The plaintiffs then gave evidence to show that Pearce, by whom the duplicate engrossment of the *memorandum* was signed, was the attorney and agent of all the defendants, and authorized to sign the same on their behalf. They then tendered in evidence the said duplicate engrossment of the said *memorandum* endorsed on the said duplicate endorsement of the said agreement: whereupon the counsel for the defendants objected that the agency of Pearce was not proved: but the Lord Chief Justice overruled the objection, and the said *memorandum* was then read in evidence on the part of the plaintiffs. [It was signed "J. M. Pearce, solicitor to the within-named parties of the third part."]

The plaintiffs then proved that the said memorandum was signed by Pearce two or three weeks after the date and execution of the agreement, and then handed by him to the plaintiffs.

The memorandum so signed by Pearce was stamped with a 20s. stamp. The other part of the memorandum so given in evidence as aforesaid, and signed by Towse and Kensit, was stamped with a 35s. stamp.

The plaintiffs then tendered in evidence the part of the *agreement* on which the part of the memorandum signed by Pearce was endorsed: whereupon the counsel for the defendant Staines objected, and insisted that the last-mentioned part of the said *agreement* was not admissible in evidence as part of and incorporated in the said duplicate memorandum, because such duplicate \*memorandum and duplicate agree- [566  
ment contained together more than 1080 words, and were not sufficiently stamped; and that the said last-mentioned part of the said agreement could not be read as an independent agreement, without calling the attesting witnesses to the same. The Lord Chief Justice, at the request of the said defendant, inspected the last-mentioned part of the agreement on which the said part of the said memorandum so signed by Pearce was endorsed, and the same then appeared to and did contain more than 1080 words, and appeared to have been signed by all the defendants,—the signatures of Booth, Stedman, and Edge being attested by one Dalton,—those of Staines and Whiskin by one Jerwood,—and those of Robertson and Dimsdale by Pearce.

It was then further proved, and it then appeared, that the said last-mentioned part of the *agreement*, and also the said part of the said *agreement* so signed by Towse and Kensit, were each respectively stamped with a 35s. stamp.

The plaintiffs again tendered in evidence the said part of the agreement signed by the defendants: and thereupon the Lord Chief Justice ruled and decided that the evidence given on the part of the plaintiffs did prove the agency and authority of Pearce to sign the memorandum on behalf of the defendants; and then also ruled and decided that the said part of the agreement signed by the defendants was not admissible, and could not be read in evidence without the attesting witnesses being called, unless the memorandum endorsed thereon, and so signed by Pearce as aforesaid, was stamped with a 35s. stamp; and that, for want of such 35s. stamp on the said memorandum so signed by Pearce, the said last-mentioned part of the agreement could not be read in evidence; and thereupon he rejected it.

The plaintiffs' counsel excepted to this ruling, \*insisting that [567  
the 20s. stamp upon the memorandum signed by Pearce was sufficient to render the agreement upon which it was endorsed, admissible in evidence.

The jury being by consent discharged from giving any verdict upon

any of the issues other than and except the issue joined upon the first plea (*non assumpsit*) of the defendant Staines, his lordship directed them, that, by reason of the plaintiffs' not having the last-mentioned memorandum stamped with a 35s. stamp, the last-mentioned part of the agreement (signed by the defendants), could not be read in evidence; and that, the agreement, for that reason, not being proved, they must give their verdict in favour of the defendant Staines upon the issue joined upon his first plea. To this ruling and direction the plaintiffs' counsel again excepted: and thereupon the jury returned a verdict for the defendant Staines upon the said issue.

The exceptions now came on for argument before Parke, B., Wightman, J., Erle, J., Platt, B., Martin, B., and Crompton, J.

*Bovill* (with whom was *Brewer*), for the plaintiffs in error.—The sole question to be discussed, is, whether this agreement required any, and what, stamp. The facts are shortly these:—On the 17th of March, 1838, an agreement was executed in counterpart, each part being duly stamped with a 35s. stamp, between the Fishmongers' Company and Ogilby and the seven defendants. Two or three weeks afterwards, a memorandum was endorsed upon each part of the agreement,—the memorandum endorsed on the part of the agreement which was in the defendants' possession being signed by Towse and Kensit as the attorneys respectively for the plaintiffs and Ogilby, and being stamped with a 35s. stamp,—that endorsed on the part of the agreement in \*568] the plaintiffs' possession being signed on the defendants' behalf by Pearce, and stamped with a 20s. stamp. At the trial, the plaintiffs called for and read the part of the agreement which was in the hands of the defendants, with the memorandum endorsed thereon. They then produced their part of the agreement, and (after proving the agency of Pearce) read the memorandum endorsed upon it. They then proposed to read what the memorandum referred to as “the within-mentioned agreement.” It was thereupon objected, on the part of the defendants, that, inasmuch as the agreement was thus incorporated in the memorandum, and both together contained more than fifteen folios, a 35s. stamp upon the memorandum was necessary, in the absence of proof of the agreement it referred to, by calling the attesting-witnesses. That objection, it is submitted, was improperly allowed to prevail.

1. The agreement and memorandum related to one and the same matter, and in truth formed together one agreement, for the purposes of the stamp, though they were executed at different times: the latter was a mere explanation of the intention of the parties. This point was discussed in *The Fishmongers' Company v. Robertson*, 1 C. B. 60 (E. C. L. R. vol. 50), but no opinion was pronounced upon it, though it was understood at the time that the judges were equally divided. There are authorities, however, to show these two formed one agreement, and required only one stamp, and that the interval between the execution

of the one and the other, is of no consequence. In *Taylor v. Parry*, 1 M. & G. 604 (E. C. L. R. vol. 89), 1 Scott, N. R. 576, by a memorandum between A. and B., it was agreed that a question of boundary should be referred to some indifferent surveyor residing at a distance: by a further memorandum written on the same paper, *at a subsequent day*, it was agreed that the question should be settled by C.: and it was held, that the two memorandums \*constituted one agreement, requiring only one stamp. So, in *Stead v. Liddard*, 1 [\*569 Bingham. 196 (E. C. L. R. vol. 8), 8 J. B. Moore, 2 (E. C. L. R. vol. 17), A., by a letter in which the consideration of the transaction sufficiently appeared, entered into an agreement with B., and B. became party to the engagement by writing a few lines at the bottom of a copy of A.'s letter. C. became guarantee for B. to A., by endorsement on the back of this copy of A.'s letter, in which endorsement reference was made to the terms of the agreement on the other side: and the court held, that the whole formed one transaction, and therefore one stamp was sufficient.

2. Assuming a stamp on the memorandum to be necessary, it *was* sufficiently stamped. For the purpose of the stamp, the number of words in the agreement upon which it was endorsed, are not to be reckoned. The words of the stamp-act, 55 G. 3, c. 184, upon which this depends, are contained in the schedule, part, 1,—“Agreement, or any minute or memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, (and not otherwise charged, nor expressly exempted from all stamp-duty), where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, *together with any schedule, receipt, or other matters put or endorsed thereon, or annexed thereto*,—where the same shall not contain more than 1080 words,” a duty of 20*s.*: “and, where the same shall contain more than 1080 words, 1*l.* 15*s.*: and for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*: Provided always, that, where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such [\*570 \*letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1080 words or upwards.” This, it is submitted, is not a “schedule or receipt,” or other matter ejusdem generis: neither is it “endorsed thereon, or annexed thereto:” it is the *memorandum* that is endorsed upon the *agreement*. [PARKER, B.—That is precisely the distinction which was taken in *Attwood v. Small*, 7 B. & C. 390 (E. C. L. R. vol. 14), 1 M. & R. 246 (E. C. L. R. vol. 17).] In that case, an agreement referred to a clause in a former agreement, and provided that it should extend



to the new agreement, as if it had been repeated therein: and it was held, that the clause referred to could not be considered as "annexed to" the new agreement, so as to make an additional stamp necessary, on the ground of the agreement, with the clause, containing more than 1080 words. [MARTIN, B.—This is not quite that case. The memorandum here is merely explanatory of the original agreement.] The case of *Weedon v. Woodbridge*, 13 Jurist, 630, n., is precisely in point. There, by lease between W. W. and C. S., endorsed on a prior lease between the same parties, reciting, that, in consideration of money laid out upon the premises by W. W., C. S. had agreed to pay a further rent, it was witnessed, that, in consideration of the rent reserved by the within written indenture, and of the covenants, provisoes, and agreements therein contained, and also in consideration of the further yearly rent, W. W. demised to C. S. the premises for the residue of the term granted by the within written indenture, subject to the provisoes, covenants, and agreements therein contained, yielding the rent in addition to the rent reserved by the same indenture: and it was held, that the original lease did not require an additional stamp, on account of the lease endorsed upon it, and that the endorsed lease did not require a progressive duty within the 55 G. 3, c. 184, sched. part 1, title "*Deed*."

\*571] \*3. If the endorsed memorandums are to be treated as a separate and new agreement, then, there being only the signature of each party to the copy in the hands of the other, the two formed one agreement, and the 1*l.* 15*s.* stamp upon one was sufficient.

4. The subject-matter of the agreement did not appear to be of the value of 20*l.*

5. There clearly could be no necessity for calling the attesting-witnesses to prove the agreement executed by the defendants. [PARKE, B.—This court so decided on the former occasion: 6 C. B. 896 (E. C. L. R. vol. 60).] It was clearly receivable on the ground of its being an admission by the parties: see *Dillon v. Crawley*, Sir John Holt, 299, where Holt, C. J., says: "Can there be better evidence of a deed than to own it, and recite it under his hand and seal?"

*J. Brown* (with whom was *Hindmarch*), for the defendant *Staines*.—It certainly is difficult to distinguish the cases of *Attwood v. Small* and *Weedon v. Woodbridge* from the present case. But it is submitted that they were not well decided. The former has not escaped the censure of Mr. Tilsley,—no mean authority upon a subject of this sort. See Tilsley on the Stamp Laws, pp. 541, 542. The original agreement here clearly is incorporated in and forms part of the memorandum; consequently, the 20*s.* stamp was insufficient. When the case was before this court upon the former occasion, the court say,—6 C. B. 914 (E. C. L. R. vol. 60),—"We are unanimously of opinion that the effect of the memorandum endorsed upon the original agreement in this

case, was, to incorporate and make the whole one new agreement." [PARKE, B.—That judgment had no reference to the agreement being part of the memorandum, for the purpose of the stamp-duty, but was merely with a view to show why it was unnecessary to call the attesting \*witnesses to prove the agreement.] The court cannot hold [\*572 that the original agreement is not part of the memorandum, for the purpose of the stamp, without holding that it might have been given in evidence even if it was never stamped at all. The stamp-act imposes a duty of 25s. on any "Schedule, inventory, or catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects, or containing the terms and conditions of any proposed sale, lease, or tack, or the conditions and regulations for the cultivation or management of any farm, lands, or other property leased or agreed to be leased, or containing any other matter or matters of contract or stipulation whatsoever, which shall be referred to in or by, and be intended to be used or given in evidence as part of, or as material to, any agreement, lease, tack, bond, deed, or other instrument charged with any duty, but which shall be separate and distinct from, and not endorsed on or annexed to such agreement, lease, tack, bond, deed, or other instrument." The object of that was, to prevent evasion of duty, by having a catalogue of clauses in a separate instrument. If the original agreement here required no stamp because it is not endorsed upon or annexed to the memorandum, it escapes duty under title "schedule," because it is not a separate instrument. That difficulty can only be obviated by holding that the original agreement and the memorandum together formed one new agreement. In *Veal v. Nicholls*, 1 M. & Rob. 248, it was held that an additional stamp was required in respect of an inventory referred to by an agreement, though annexed to the agreement after it was executed. [PARKE, B.—Assuming the whole to be one agreement, a duty of 2l. 15s. has been paid.] The 35s. stamp was used up and exhausted by the original agreement: it cannot, therefore, be prayed in aid of the deficient stamp upon the \*memorandum. [PARKE, B.—It does not appear upon the re- [\*573 cord when the stamp was affixed: the presumption, unless the contrary appears, is, that everything has been properly done. Must we not assume that the paper was stamped after the second agreement was executed? In that case, the stamp would be sufficient.] The court will hardly assume that the parties neglected to stamp the agreement within the proper time. [WIGHTMAN, J.—Where an instrument is not required by law to be stamped within a particular time after its execution, the court, on its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping: *The King v. The Inhabitants of Preston*, 5 B. & Ad. 1028 (E. C. L. R. vol. 27.)] The defendants ought not to be prejudiced by such an omission in the bill of excep-

tions: if necessary, the court will allow it to be amended. [PER CURIAM.—Not to aid such an objection as this.] In *Bacon v. Simpson*, 3 M. & W. 78,† an agreement for assigning a house, provided that either party making default should pay to the other 500*l.* as liquidated damages: after the making of the agreement, but before the day for its completion arrived, the parties agreed, by an endorsement on the former agreement, to enlarge the time for its performance for a few days: and it was held that this amounted to a fresh agreement.(a)

\*574] *Crowder*, who appeared for *Dimsdale*,—who had not \*pleaded non assumpsit,—claimed to be heard. [PLATT, B.—*Dimsdale* has admitted the contract upon the record. How can he be heard to make this objection? Could you have been heard upon *Staines's* demurrer?] No. But this is a different case. All the defendants are equally interested in the judgment. [WIGHTMAN, J.—If Mr. Brown had waived the objection at the trial, could you have insisted upon it?] Clearly. [WIGHTMAN, J.—In case of a judgment by default, you could only have been heard for the purpose of cutting down the damages. PARKE, B.—Protesting that you ought not to be heard, we will hear you.]

*Crowder* then proceeded to argue on behalf of *Dimsdale*: but his argument necessarily resembled that urged by Brown.

*Bovill*, in reply, was stopped by the court.

PARKE, B.—We are all of opinion that the Lord Chief Justice was wrong in putting the construction he did upon the dicta of this court when this case was before us in 1848, and that there must again be a *venire de novo*. The principal reliance has been placed upon the assumption that the court upon that occasion decided that the original agreement was incorporated with the memorandum, and that the two together formed one agreement. But, if the argument and the decision be closely looked at, it will be evident that all that the court say, is, that the effect of the memorandum was to recognise and refer to the former agreement, not so as to incorporate it for all purposes, but to explain and render more intelligible the meaning of the parties. None of the court intended to say anything with reference to the stamp-act. All they meant to lay \*575] down, was, that the memorandum so far incorporated the \*former agreement as to render it unnecessary to prove it by the subscribing witness. The memorandum consists merely of a declaration, in the first place, that the parties are not to be jointly liable, as they probably would be under the first agreement, and secondly, to explain for what the 1000*l.* was to be paid to the plaintiffs,—not for foregoing their

(a) In *Sneezum v. Marshall*, 7 M. & W. 417,† an agreement for the sale of a house stated that the sale was subject to the covenants set forth "in a draft lease delivered this day:" and it was held, that, in calculating the number of words, with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and, the agreement containing less than 1080 words, and being stamped with a 20*s.* stamp, that the stamp was sufficient. And see *Vollans v. Fletcher*, 1 Exch. 20.†

threatened opposition to the defendants' bill in committee, but for the maps, plans, and surveys. If we look at the memorandum only, which is contained in the same sheet of paper on which the agreement is written, though it admits the former agreement, so as to make it unnecessary to prove it in the usual way; yet we have two decisions showing that it does not so incorporate it as to require us to count in the words of such former agreement, with a view to the stamp-duty. A party cannot be made to pay a larger duty, unless the words of the statute clearly and unequivocally impose upon him that obligation. The language which has been referred to embraces only those matters which are endorsed upon the agreement, or are annexed to it so as to form essentially part of it. It may be that this decision may give occasion for some evasion of the stamp-act: but that we cannot help. We think that this memorandum does not incorporate the original agreement at all; but is a distinct agreement in itself; and that, even if it did incorporate the original agreement, there is no clause in the stamp-act which hits the present case. We are therefore of opinion that the memorandum was properly stamped, and consequently that there must be a venire de novo.

Venire de novo.

**\*THE GREAT NORTHERN RAILWAY COMPANY v. HARRISON and Others. June 17. [\*576**

A contract under seal recited that the defendants, a railway company, were "desirous of being supplied with 350,000 sleepers of Dantio or Memel timber." This contract was based upon a specification, prepared by the company, in which it was stated, that, "the number of sleepers required under this specification is, 350,000; one-half will have to be delivered in 1847, and the remainder by Midsummer, 1848;" that "the deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge or other vessel, *as may be directed by the resident engineer*;" and that the payments were to be made upon the engineer certifying the due delivery of each cargo.

By the contract, the plaintiffs covenanted to supply the company with 350,000 sleepers of the quality and description mentioned, and to deliver them within the times mentioned in the specification, "as and when, and in such quantities, and in such manner, as the engineer of the company should, by order or requisition in writing, from time to time, within the period limited by the specification, direct or require." The engineer was to be at liberty, at any time before the complete execution of the contract "by the delivery of the whole number of 350,000 sleepers," to alter their size, form, or construction, or to vary the times of delivery "of any of the said sleepers which should not then have been delivered." And the defendants, in consideration of the premises, covenanted to pay to the plaintiffs, "for or in respect of the said sleepers hereinbefore contracted to be supplied," a certain price, upon their engineer certifying the due delivery of each cargo. And it was further agreed that 2000% of the price should be retained by the company until two months after their engineer should have certified that "the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors, shall have been supplied:"—

Held, by the Exchequer Chamber,—affirming the judgment of the court below,—that this was a positive contract by the plaintiffs to supply, and by the defendants to take and to pay for, the whole number of 350,000 sleepers; and that the plaintiffs were entitled to the notice of the times when the sleepers would be required.

The third plea traversed an averment in the declaration that the defendants had notice that the plaintiffs were ready and willing to supply the sleepers, and alleged that the defendants had

24 C. L. J. 221.

no notice of any sleepers being ready for them at the port of delivery:—Held, that the allegation of readiness and willingness was unnecessary, for, that the plaintiffs were not bound to deliver until they received the orders or directions of the company's engineer; and, consequently, that,—the jury having found that issue for the defendants,—the plaintiffs were entitled to judgment non obstante verdicto thereon.

THIS was an action of covenant brought by Messrs. Harrison & Co., the plaintiffs below, against The Great Northern Railway Company, upon the following contract, under seal:—

“This indenture, made the 12th of February, 1847, between The Great Northern Railway Company of the one part, and John Crowther Metcalf Harrison, Charles Harrison, and Stephen West, of the town of Kingston-upon-Hull, and Richard Harrison and William Singleton, of Leeds, in the county of York, timber merchants, trading at the borough \*577] of Kingston-upon-Hull \*aforesaid, under the style or firm of Messrs. R. & J. Harrison, and at Leeds aforesaid, under the style or firm of Messrs. Harrison & Singleton, who are hereafter called ‘the contractors,’ of the other part:

“Whereas the said company are desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber: And whereas the particular size and description of the said sleepers are set forth in the specification hereunto annexed, or hereunder written, and in certain drawings therein referred to; and in the same specification are also set forth the several times within which, and the port at which, the same sleepers will be required to be delivered: And whereas the said contractors are willing to supply the said company with the said 350,000 sleepers, upon the terms mentioned in the said specification, and in the tender of the said contractors, a copy of which is hereunder written, and to enter into the several covenants and agreements hereinafter contained: Now, this indenture witnesseth, that, in consideration of the covenants and agreements hereinafter contained on the part of the said company to be observed and performed, they the said plaintiffs do hereby, for themselves jointly, and each of them as a separate covenant doth hereby for himself severally, and for his heirs, executors, and administrators, covenant and contract with The Great Northern Railway Company, in manner following, that is to say, that they the said contractors, their executors, administrators, or assigns (such assigns to be approved of by or on behalf of the said company, as hereinafter required), some or one of them, shall and will, within the times and at the place mentioned in the said specification, as and when, and in such quantities, and in such manner, as Joseph Cubitt, Esq., or John Miller, Esq., or other the principal engineer, or one of the principal engineers for the time being of the said company, shall, by order or requisition in writing under his hand, from time to time, or any time within the period \*578] limited in \*and by such specification, direct or require, furnish and supply the said company with 350,000 sleepers of Dantzic or Memel timber; that such sleepers shall be of such description,

quality, manufacture, and size, and of such form and construction, as are mentioned in the said specification, and to be equal in all respects to the specimens deposited with the said Joseph Cubitt, and now lying, &c.: That, in case the said Joseph Cubitt, or the said John Miller, or other the principal engineer, or any one of the principal engineers for the time being of the said company, shall, at any time before the complete execution of this contract by the delivery of the whole number of 350,000 sleepers, be desirous of altering the size, form or construction of, or of changing or varying the times of delivery of any of the said sleepers which shall not then have been delivered, he shall be at liberty so to do, and then and in such case a proportionate and fair alteration shall be made in the price to be paid for the sleepers, the size or form or construction of which shall be so required to be altered, or the times of the delivery of which shall be so changed or varied, either by increasing or diminishing, as the case may be, the price hereinafter agreed to be paid for each sleeper supplied by the said contractors; and it shall be lawful for the engineer of the said company by whom such alteration or change shall be required to be made, to settle whether any alteration in price shall be made, and if so, to what extent; provided always, that, in considering the question of such alteration of price, care shall be taken that the contractors shall derive the same proportionate amount of profit as they would have had if no such alteration as aforesaid had been required to be made: That, if any of the sleepers delivered by the said contractors in pursuance of their contract, shall, in the opinion of the said Joseph Cubitt, or the said John Miller, or other the principal engineer or any one of the principal engineers for the time being of the same \*company, be unsound or of inferior quality, or shall not agree [\*579 in all respects with the said specification and with the specimens hereinbefore referred to, or, as the case may be, with the order or requisition of any such engineer as aforesaid, under the provisions for that purpose hereinbefore contained, it shall be lawful for the said Joseph Cubitt or the said John Miller, or for other the principal engineer for the time being of the said company, to reject the same, and, by a notice in writing under his hand, to be delivered to the said contractors, or any or either of them, or their or his executors, administrators, or assigns, or left at or sent by post directed to the last known place or places of abode in England of the said contractors, or any or either of them, or his or their executors, administrators, or assigns, to require the said contractors, their executors, administrators, &c., at their own expense, to remove or take away the same, and to supply an equal number of others in their place or stead, of the quality, dimensions, and kind required by the said specification, or by such order or requisition as aforesaid, within such period as shall by such notice be from time to time appointed or limited: That, in case the said con-

tractors, their executors, administrators, or assigns, shall refuse or fail or neglect to deliver to the said company, at the place where, and on or before the days or times at which, the said Joseph Cubitt, or John Miller, or other the principal engineer, or any one of the principal engineers for the time being of the company, shall have required the same to be delivered as hereinbefore mentioned, the required number of sleepers, of such size, form, construction, and quality as are hereinbefore stipulated for, or, as the case may be, of such other size, form, construction, and quality as may be required by any of the principal engineers for the time being of the said company, under the power for that purpose hereinbefore contained, or shall refuse or fail or neglect, when required so to do by such notice as aforesaid, to remove and take

\*580] away any sleepers which \*shall have been rejected by any of the principal engineers for the time being of the company, and in their place or stead to substitute a like number of sleepers of proper form, size, construction, and quality, to the satisfaction of the said Joseph Cubitt, or the said John Miller, or other the principal engineer or one of the principal engineers for the time being, of the said company; then, and in every of such cases, it shall be lawful for the said company, or their agents, from time to time, at the costs and expense of the said contractors, their executors, administrators, or assigns, to purchase and provide such number of sleepers of like size, construction, and quality as aforesaid, as will make up the full number hereinbefore agreed to be supplied by the said contractors, their executors, administrators, or assigns, and also from time to time to supply the place of such sleepers as shall have been rejected as aforesaid, and whose place or places shall not have been supplied by the said contractors, their executors, &c., and also after one month's notice to the said contractors, to remove such rejected sleepers as shall not have been taken away by the said contractors, their executors, &c., to such place or places as the said company or their agents may from time to time think proper, without any liability on the part of the said company or their agents for any loss or damage which may thereby happen to such sleepers, either from the manner of removal or the insecurity of the place to which the same shall be removed, or from any other cause whatever: That, when and so often as the said company shall from any such cause as aforesaid, have been compelled to purchase any sleepers, it shall be lawful for any of the principal engineers for the time being of the said company to certify under his hand the amount of such purchase-money, and also the amount of the costs and value of the damage which the said company may have been put to or have sustained by such refusal, failure, or delay on the part of the said contractors, their executors, &c., to fulfil this

\*581] \*contract, or any part thereof, and it shall be lawful for the said company from time to time to deduct the amount of such purchase-money, costs, and damages, when so certified as aforesaid, out of

or from any moneys which shall be then due, or may thereafter become due, from the said company to the said contractors, their executors, &c., under or by virtue of these presents; and, in case the sum or sums so authorized to be deducted as aforesaid shall exceed the amount of money payable to the said contractors, their executors, &c., as aforesaid, then and in every such case the said contractors, their executors, &c., shall and will, on demand by the said company, pay the excess of such purchase-money, costs, and damages, unto the said company: That, in case the said contractors, their executors, &c., shall not regularly deliver the said sleepers in such quantities and at such times and place as are or is herein agreed upon, to the satisfaction of the said Joseph Cubitt, or of the said John Miller, or of other the said principal engineer, or any one of the principal engineers for the time being of the said company, according to this contract, or shall from any cause whatsoever other than the acts of the said company, their officers, engineers, or authorized agents, be prevented from making such delivery or deliveries as aforesaid, according to this present contract, and if such default, impediment, or delay shall continue for the space of fifteen days next after notice in writing, signed by the secretary of the said company, or by the said Joseph Cubitt or the said John Miller, or by other the principal engineer, or by any one of the principal engineers for the time being of the said company, requiring them to put an end to such default, impediment, or delay, shall have been given to the said contractors, or any or either of them, or to their or his executors, &c., or left for or sent by post directed to them, or any or either of them, at their or any or either of their usual or last known place or places of \*abode in England, or, if they, the said contractors, before the completion of this contract, shall be declared bankrupt or insolvent, then and in any of such cases it shall be lawful for the said company, if and as they shall think proper, by writing under the hand of the secretary of the company, to be delivered to the said contractors or any or either of them or their or his executors, &c., absolutely to determine this contract; and, in such case, all the moneys due from the said company to the said contractors, but which according to the agreements herein contained shall not have been actually paid to them in possession, and all moneys which otherwise would have become payable to them thereafter from the said company, shall be held and retained by the said company, and be applied in payment to them of all costs, damages, and expenses which, in the judgment of the said Joseph Cubitt, or of the said John Miller, or of the principal engineer or any one of the principal engineers for the time being of the said company, they shall actually sustain or be put to by reason of the default of the said contractors: That, if the moneys so retained by the said company under the last foregoing agreement shall be insufficient to discharge the expense of providing all such sleepers as shall have



been so neglected to be supplied by the said contractors, and to indemnify the said company against all such costs, damages, and expenses as aforesaid, then the said contractors, their executors, &c., shall and will make good and pay to the said company, such deficiency, on demand: That, if the moneys so retained shall be more than sufficient fully to indemnify the said company in manner aforesaid, then and in such case the surplus thereof shall be paid over by them to the said contractors, their executors, &c.: That all such forfeitures, penal sums, and reservations as are herein, eventually or otherwise, reserved or agreed to be paid or made respectively to the said company, \*583] are stipulated and intended to be specifically rendered to or retained by them in the nature of liquidated damages; and that no relief against the same forfeitures or reservations shall be sought in any court of law or equity; and these presents shall or may be pleaded in bar to any such relief, or application for the same: That the said contractors, their executors or administrators, shall not, nor will, unless with the previous consent of the said company, signified in writing under the hand of the secretary of the said company, assign, transfer, or sublet the contract hereby entered into, or any part thereof; and that no such contract shall be valid, unless it contains the names or name of the persons or person to whom such assignment, transfer, or subletting, is proposed to be made, and also the number of sleepers to be by such person or persons supplied; and that no such sub-contract or assignment, with or without the consent of the said company, shall exonerate the said contractors, their heirs, executors, or administrators, from their respective liability under these presents for the due performance of all the matters herein comprised; and such liability shall continue unaffected by any such subletting or assignment: And this indenture further witnesseth, that, in consideration of the premises, and of the covenants and agreements hereinbefore contained on the part of the said contractors to be observed and performed, the said Great Northern Railway Company do hereby covenant and agree with the said contractors, their executors, &c., that they the said company shall and will pay to the said contractors, their executors, &c., for or in respect of the said sleepers hereinbefore contracted to be supplied, the price of 4s. 8d. per sleeper, at the times and in manner hereinafter mentioned, that is to say, that, when and as often as the said Joseph Cubitt or John Miller, or other the principal engineer, or one of the \*584] principal engineers for the time being of the said \*company, shall have certified, in the manner hereinafter mentioned, that a cargo of sleepers to an amount or value stated in such certificate has been delivered, and that the sum stated in such certificate as the amount or value of such sleepers is due and owing to the said contractors, and no deductions are to be made therefrom on account or in respect of the several sums of money hereinbefore authorized to be deducted from the

sums payable to them by the said company, then the said company shall and will forthwith pay unto the said contractors, their executors, &c., the sum stated in such certificate as the amount or value of such sleepers; or, in case any deductions are to be made therefrom, then so much thereof as may be due and owing to them after such deductions shall have been made: And it is hereby further agreed that each delivery or cargo of sleepers shall be examined by the resident engineers of the company, or other the parties who may be appointed by the said company for that purpose, who shall certify the number thereof which are in accordance with the true intent and meaning of the said specification, and of this contract; and, when such certificate shall have been countersigned by the said Joseph Cubitt or the said John Miller, or by other the principal engineers for the time being of the said company, the said contractors, their executors, &c., shall be entitled to receive from the said company, within one calendar month from the time of the delivery of each cargo, the amount of the moneys payable to them in respect thereof, according to the agreements herein contained: Provided always, that the said sleepers shall not be deemed to have been duly supplied, nor shall the said contractors, their executors, &c., be entitled to receive payment for the same in manner aforesaid, unless the same shall have been supplied in all respects according to the forms and requirements of the said specification, and of this contract, and shall have been certified by the said \*resident engineer to have been so supplied, and his certificate thereof shall have been countersigned in manner aforesaid: Pro- [\*585  
vided always, and it is hereby agreed and declared between and by the said parties hereto, and the said plaintiffs (naming them) do, and each of them doth, hereby consent and agree, notwithstanding the covenants hereinbefore contained for payment by the said company of the full amount due to the said contractors, for sleepers delivered, within one calendar month from the delivery thereof, that no sum of money shall be claimed by or received by them on account of the sleepers so supplied, until sleepers above the value of 2000*l.* shall have been delivered to and certified to have been received by the said company; and that, as soon as sleepers to the amount or value of 2000*l.* shall have been so delivered to and certified to be received by the said company, such sum of 2000*l.* shall not be paid to the said contractors, but shall be retained by the said company, without interest, and the excess only of the value of the sleepers supplied over and above the sum of 2000*l.* shall be from time to time paid to the said contractors; it being the intention of the parties hereto that the payment to the said contractors on account of the sleepers supplied by them under this contract shall always fall short of, and be less by 2000*l.* than, the sum actually due to them on account thereof,—to the end and intent that the said company may always have in their hands the sum of 2000*l.*, for the purpose of securing the due

performance of this contract, and the payment of the several sums which may be due to the said company by the said contractors, their executors, &c., under or by virtue of the provisions of these presents: And it is hereby further agreed, that, within two calendar months after the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors shall have been supplied, and a certificate \*586] thereof shall have been signed by the said Joseph \*Cubitt, or the said John Miller, or by the principal engineer, or any one of the principal engineers for the time being of the said company, and all demands between the said company and the said contractors, their executors, &c., shall have been finally settled and adjusted, the said sum of 2000*l.* so agreed to be retained by the said company for the purposes aforesaid, or so much thereof as may then remain due and owing to the said contractors, their executors, &c., by the said company, shall be paid over to them by the said company: Provided, nevertheless, that neither the certificate of the engineer of the said company declaring the sums owing to the said contractors, their executors, &c., from time to time, nor the payment of the said sum of 2000*l.*, or the balance thereof, shall operate to release them from their liability to remove and carry away any sleepers supplied by them, which may have been previously rejected on the behalf of the said company, and to supply other sleepers in their place or stead: And it is hereby further agreed, that, in case, and so often as, any dispute shall arise between the said company and the said contractors, their executors, &c., concerning or relating to the said sleepers hereby contracted for, or any of them, or to any covenant, engagement, matter, or thing herein contained, the subject of every such dispute shall be referred to the decision of the said Joseph Cubitt or John Miller, or other the principal engineer, or any of the principal engineers for the time being of the said company, at the option of the said company, whose decision and determination shall be final and conclusive and binding upon all parties: And it is hereby further agreed, that, when and as often as any cargo or quantity of sleepers shall have been delivered as aforesaid by the said contractors, and shall have been examined by some resident engineer of the company or other the parties who may be appointed by the said com- \*587] pany for that purpose, and who shall have certified the \*number thereof which are in accordance with the true intent and meaning of the said specification and this contract, the same and every of them, and every part thereof, shall, immediately after the signing of such certificate, and notwithstanding the same shall not have been countersigned by one of the principal engineers of the said company, be and be considered to remain at the sole risk and expense of the said company in all respects: And, lastly, it is hereby agreed that the costs, charges, and expenses attending the preparation and execution of this contract, and of a bond to be entered into by the said contractors for

the due and complete performance of the several covenants, conditions, and agreements herein contained, and on their part and behalf to be observed and performed, shall be borne and paid, in equal proportions, by the said contractors, their executors, &c., and the said company.

The specification contained the following, among other, provisions:—  
 “The number of sleepers required under this specification, is 350,000. One-half will have to be delivered in 1847, and the remainder by Midsummer, 1848. The port at which the deliveries will have to be made, is, Goole. [Then followed a description of the sleepers, and a drawing.] All sleepers which in the judgment of Mr. Joseph Cubitt or Mr. John Miller, engineers to The Great Northern Railway Company, are in any respect inferior to the above specification, will be rejected, and their amount deducted from the payments. Each delivery or cargo of sleepers will be examined by the resident engineers or other parties appointed for the purpose; and they will certify the number thereof which are in accordance with the true intent and meaning of this specification; and payment will be made on their certificates, countersigned either by Mr. Joseph Cubitt or Mr. John Miller, according to the districts to which the respective deliveries \*appertain. The deliveries are to be made either by stacking the sleepers upon a wharf, or properly [\*588 loading them into a boat or barge or other vessel, as may be directed by the resident engineer; and all labour and expense of all kind incurred in so stacking them upon the wharf, or loading them into a boat, barge, or vessel as aforesaid, to be paid for by the contractors. Payments will be made monthly; within one month of the date of the engineer’s certificate of each cargo, after sleepers to the amount of 5000*l.* shall have been delivered and certified; which sum of 5000*l.* shall remain in the hands of the company, without interest, as a guarantee for the due and proper performance of the contract, until two months after date of certificate by the engineer that the said contract is completed, and to his satisfaction; and, should the contractor refuse to execute his contract in accordance with all the terms and conditions herein specified, the said sum of 5000*l.* shall become forfeit to the company. Tenders are to be made at a price per sleeper, which price is to include every expense whatever attendant on the supply, delivery, stacking, or stowing of the sleepers, except dues and wharfage at the ports where the deliveries are made. The party whose tender may be accepted, will be required to execute a regular contract and bond prepared by the company’s solicitor, embodying the terms and conditions herein specified, for the due performance of his contract; the expenses of preparing such contract and bond to be borne equally by the two contracting parties.”

The “tender” was contained in a letter addressed by the plaintiffs to the secretary of the company, in which was the following passage,—  
 “We now beg leave to hand you a contract for the 200,000 sleepers which your company *have agreed to take*; and, in reference to a further

quantity delivered at Goole, we will undertake to supply 300,000 or as  
 \*589] many more as you \*may want to complete your line, at the same  
 price, 4s. 3d. each."

The declaration, after averring the identity of the documents set out, and of the contracting parties, alleged,—that, after the making of the said indenture, and before this suit, the year of our Lord 1847, and Midsummer in the year of our Lord 1848, elapsed and expired: That, as to the said half of the said sleepers, to wit, 175,000 thereof, covenanted as aforesaid to be delivered in the year 1847, the plaintiffs had always fulfilled all things in the said indenture contained on their part to be fulfilled in respect of the said half of the said sleepers to be delivered in the year 1847, except so far as they were prevented by the defendants and their engineers as hereinafter mentioned: that, as to the said half of the said sleepers, to wit, 175,000 thereof, to be delivered in the year 1847, they were always ready and willing, within the time and at the place mentioned in the said specification for the delivery of the said half of the said sleepers, to wit, during the said year 1847, at Goole, as and when, and in such quantities, and in such manner, as the said Joseph Cubitt or the said John Miller, or other the principal engineer or one of the principal engineers for the time being of the said company, should, by order or requisition in writing under his hand, from time to time, or at any time within the period limited in that behalf in and by the said specification, direct or require, to furnish and supply the defendants with the said half of the said sleepers, of Dantzic or Memel timber, of such description, quality, manufacture, and size, and of such form and construction, as were mentioned in the said specification, and to be equal in all respects to the said specimens in the said indenture in that behalf mentioned, and in all respects according to the said indenture; and that the said year 1847 elapsed before this suit: Yet that  
 \*590] the said Joseph Cubitt \*did not, nor did the said John Miller, or any other principal engineer or engineers of the said company, in or during the said year 1847, or at any time, make or give to the plaintiffs, or either of them, any order or requisition in writing under his or their hands, touching or concerning the said half of the said sleepers to be delivered as aforesaid in the said year 1847, or any part thereof, or the delivery thereof, or any part thereof, or the manner, time, or quantity in which the said half of the said sleepers, or any part thereof, was to be delivered; whereby the plaintiffs were wholly deprived of the gains and profits which they might and otherwise would have made by the delivery of and payment for the said half of the said sleepers according to the said indenture, to wit, 20,000*l.*: That, as to the remainder of the said sleepers, to wit, 175,000 thereof, covenanted as aforesaid to be delivered by Midsummer, 1848, they the plaintiffs had always fulfilled all things in the said indenture contained on their part to be fulfilled in respect of the said remainder of the said sleepers,

except so far as they were hindered by the defendants and their engineers as thereafter mentioned; and that, as to the said remainder of the said sleepers, to wit, 175,000 thereof, covenanted as aforesaid to be delivered by Midsummer, 1848, they were always ready and willing, within the time and at the place mentioned in the said specification for the delivery of the said remainder of the said sleepers, to wit, until and at Midsummer, 1848, at the said port of Goole, as and when, and in such quantities, and in such manner, as the said Joseph Cubitt or the said John Miller, or other the principal engineer, or one of the principal engineers for the time being of the said company, should, by order or requisition in writing under his hand, from time to time, or at any time within the period limited in that behalf in and by the said specification, direct or require, to furnish and supply the \*defendants with the said remainder of the said sleepers of Dantzic or Memel [\*591 timber, of such description, quality, manufacture, and size, and of such form and construction, as were mentioned in the said specification, and to be equal in all respects to the said specimens in the said indenture in that behalf mentioned, and in all respects according to the said indenture: Yet that the said Joseph Cubitt did not, nor did the said John Miller, or any other principal engineer or engineers of the said company in or during the said year 1847, or before or at Midsummer, 1848, or at any time, make or give to the plaintiffs, or either of them, any order or requisition in writing under his or their hands, touching or concerning the said remainder of the said sleepers to be delivered as aforesaid by Midsummer, 1848, or any part thereof, or the delivery thereof, or any part thereof, or the manner, time, or quantity in which the remainder of the said sleepers, or any part thereof, was to be delivered, whereby the plaintiffs were wholly deprived of the gains and profits which they might and otherwise would have made by the delivery of, and payment for, the said remainder of the said sleepers, according to the said indenture, to wit, 20,000*l.*, &c.

The defendants pleaded,—first, *non est factum*,—secondly, as to so much of the declaration as related to the said half of the said sleepers so covenanted as therein mentioned to be delivered in the year 1847, and the causes of action in relation thereto, that the plaintiffs were not ready and willing, within the time and at the place mentioned in the specification for the delivery of the said half of the said sleepers during the said year 1847, at Goole, as and when, and in such quantities, and in such manner, as the said Joseph Cubitt or the said John Miller, or other the principal engineer, or one of the principal engineers for the time being of the said company should, by order or requisition in writing under \*his hand, from time to time or at any time, within the period limited in that [\*592 behalf in and by the said specification, direct or require, to furnish or supply the defendants with the said half of the said sleepers, or any part, of the description, quality, manufacture, size, form, and construo-

tion aforesaid, and equal in all respects to the said specimens, in manner and form as the plaintiffs had in the declaration in that behalf alleged; concluding to the country.

Thirdly, that the defendants had no notice or knowledge that the plaintiffs were ready and willing, as in the declaration mentioned, to furnish or supply the defendants with the said half of the said sleepers, in manner and form as was therein supposed; nor did the plaintiffs at any time give any notice whatever to the defendants of any sleepers whatever being at, or deliverable at, Goole aforesaid, according to the said contract; concluding to the country.

Fourthly, as to so much of the declaration as was in and by the third plea pleaded to, that the plaintiffs did not, during any part of the said year 1847, deliver to the defendants the said half of the said sleepers, or any part thereof, at the said place mentioned in the said specification for the delivery thereof; wherefore the defendants pray judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

Fifthly, as to so much of the declaration as related to the remainder of the said sleepers covenanted as aforesaid to be delivered by Midsummer, 1848, that the plaintiffs were not ready and willing, within the time, and at the place mentioned in the said specification for the delivery of the said remainder of the said sleepers as and when and in such quantities and in such manner as the said Joseph Cubitt or the said John Miller, or other the principal engineer or engineers for the time being \*of the said company, should by order or requisition in writing \*593] under his hand, from time to time, or at any time within the period limited in that behalf in and by the specification, direct or require, to furnish and supply the defendants with the said remainder of the said sleepers, of the description, quality, &c., aforesaid, and equal in all respects to the said specimens, in manner and form as in the declaration in that behalf alleged; concluding to the country.

Sixthly, as to so much of the declaration as is in and by the last preceding plea pleaded to, that the defendants had no notice or knowledge that the plaintiffs were ready and willing, as in the declaration alleged, to furnish or supply the defendants with the said remainder of the said sleepers, in manner and form as in and by the declaration supposed; nor did the plaintiffs at any time give any notice whatever to the defendants of any sleepers whatever being at, or deliverable at, Goole aforesaid, according to the said contract; concluding to the country.

Seventhly, as to so much of the declaration as in and by the last preceding plea pleaded to, that the plaintiffs did not, during any part of the said year 1848, deliver to the defendants the said remainder of the said sleepers, or any part thereof, at the place mentioned in the said specification for the delivery thereof; wherefore the defendants prayed

judgment if the plaintiffs ought to have or maintain their aforesaid action against them.

Eighthly, that the plaintiffs did not, nor did either of them, at any time request the defendants, or the said Joseph Cubitt or John Miller, or any of the principal engineers for the time being of the defendants, or other person or persons in that behalf authorized to make or give the same, to make or give to the plaintiffs, or either of them, any order or requisition in writing under his or their hands, touching or concerning any part of the \*said 350,000 sleepers so contracted by the [\*594 defendants to be delivered as aforesaid, or the delivery thereof, or the manner, time, or quantity in which they, or any part thereof, were to be delivered; wherefore the defendants prayed judgment if the plaintiffs ought to have or maintain their aforesaid action against them.

The plaintiffs joined issue on the first, second, third, fifth, and sixth pleas, and demurred specially to the fourth, seventh, and eighth.

The issue of facts came on for trial before Alderson, B., at the Surrey Summer Assizes in 1851, when a verdict was found for the plaintiffs upon the first, second, fifth, and sixth, and for the defendants upon the third issue.

The demurrers were argued in Michaelmas Term, and in Hilary Term last, the court below gave judgment thereon for the plaintiffs,—vide 11 C. B. 815 (E. C. L. R. vol. 73).

Judgment was entered up accordingly on the 26th of April last, and a writ of error brought, which now came on for argument before Parke, B., Wightman, J., Erle, J., Platt, B., Crompton, J., and Martin, B.

*Bovill* (with whom was *Byles*, Serjt.), for the plaintiffs in error.—The general nature of the action is, that it is founded upon a supposed contract between the plaintiffs below and the Great Northern Railway Company, for the supply by the former to the latter of certain railway sleepers. [PARKE, B.—The first question is, whether it can be collected from the whole of the instrument that there is any obligation upon the company to take the whole number of 350,000 sleepers.] Further, the plaintiffs below must show that the company were bound, by their engineer, to give orders; the only breach assigned, being, that the engineer did not give orders touching the delivery of the sleepers, or the manner, time, or quantity in which they were to be delivered. The deed begins \*with a recital that the company “are desirous of being supplied with 350,000 sleepers,”—not that they have agreed to [\*595 take that quantity. The deed contemplates a delivery of the sleepers, one half in the year 1847, and the rest by Midsummer, 1848. That, without more, would enable the contractors to perform their part of the contract by delivering the first half on the 31st of December, 1847, and the remainder on the 24th of June, 1848: *Startup v. Macdonald*, 2 M. & G. 395 (E. C. L. R. vol. 40), 2 Scott N. R. 485, and 6 M. & G. 593 (E. C. L. R. vol. 46), 7 Scott N. R. 269. It is to obviate that in-



convenience, and for the benefit of the company, that the stipulation which is sought to be turned into a contract by the company, and which it is material to observe is found among the covenants of the contractors, was introduced. The utmost effect of the stipulation that the times and mode of delivery shall be subject to the orders of the company's engineer, is, to make the giving of such orders a condition precedent to their right to complain of a non-delivery on the part of the contractors. So, it was a condition precedent to the contractors' right to demand payment, that there should be a certificate of the company's engineer that a certain amount of sleepers had been delivered to his satisfaction. But a covenant that the engineer shall give such certificate, is not to be implied from that. In *Morgan v. Birnie*, 9 Bingh. 672 (E. C. L. R. vol. 25), 3 M. & Scott, 76, the defendant was to pay for a building upon receiving an architect's certificate that the work was done to his satisfaction: the architect checked the builder's charges, and sent them to the defendant: and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay, on the ground that no such certificate had been rendered. *Milne v. Field*, 5 Exch. 829,† is to the same effect. And there are cases in equity where the same principle has been acted upon: *Kirk v. \*The Guardians of the Bromley Union*, 2 Phil. 640; *M'Intosh v. The Great Western Railway Company*, 2 M'N. & G. 74. This deed contains distinct covenants by each party. The only part where anything is said about the certificate of the engineer, is that part in which the *plaintiffs* are contracting. The company have not covenanted to do anything, or to pay anything, except when the engineer has certified. The general rule of law is, that, where there are express covenants, none others shall be implied. In *Com. Dig. Covenant* (A. 3), it is said: "If the words are only a qualification of the words on the other part, covenant lies not; as, if a lessee covenants to repair, *provided that the lessor finds timber*: this is not a covenant by the lessor to find it, if there be not the word *agreed*:" 1 Roll. 518, l. 25. What is this covenant? A covenant that the plaintiffs will deliver certain sleepers by a certain time, or sooner provided the engineer of the company shall give orders for that purpose. If so, it comes precisely within the case there put. Again, Comyns says: "If B. covenants to pay 100*l.* to A., and he covenants, *upon receipt, to give an acquittance, and to make an obligation*, &c., it is not any covenant that he will receive and give an acquittance:" 2 Danv. 231. In *Wolveridge v. Steward*, 1 C. & M. 644,† 3 M. & Scott, 561, A., by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained in the original lease:" B. entered under this assignment, and afterwards assigned over to a third person: and it was held that B. was not liable, in

covenant, to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee,—the words “subject to the payment of the rent,” &c., being words of qualification, and not of contract. Tindal, C. J., delivering the judgment of the court of error, said: “It is \*fully established, that no precise form of words is necessary to constitute a covenant,—‘Any words in a deed which *show an* [<sup>\*597</sup> *agreement* to do anything, make a covenant:’ Com. Covenant (A. 2): but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification: Com. Covenant (A. 3); 1 Roll. Abr. 518. Are, then, the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification, to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor, not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable? To determine this, we must look at the indenture as stated on the record, and observe in what part the words occur. They come after the habendum, and constitute a part of it. Though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself; and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended: this is properly done in the habendum. The office of the habendum is, to limit the certainty of the estate: Co. Litt. 6 a. ‘It doth qualify the general intendment of the premises; and the reason of this is, for that it is a maxim of law that any man’s grant shall be taken by construction of law most forcible against himself:’ Co. Litt. 138 a. See also Hale, 171; Com. Dig. *Fait* (E. 9). As these expressions, therefore, occur in that part of the deed in which they ought to be if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only: and some instances were adduced by the counsel for the plaintiff in error, where similar words \*occurring in the same part of the deed could not possibly have any other signification.” There [<sup>\*598</sup> are many cases where the courts have had to consider the effect of instruments into which it is sought to introduce covenants by implication. Thus, in *Lees v. Whitcomb*, 5 Bingh. 34 (E. C. L. R. vol. 15), 2 M. & P. 86, it was held that a written agreement “to remain with A. B. two years, for the purpose of learning a trade,” was not binding, for want of an engagement in the same instrument by A. B. to teach. So, in *Williamson v. Taylor*, 5 Q. B. 175 (E. C. L. R. vol. 48), 1 Dav. & M. 389, by agreement between the defendant and the plaintiff, the defendant, the owner of a colliery, retained and hired the plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight, and the plaintiff agreed to

continue the defendant's servant during all times the pit should be laid off work, and, when required (except when prevented by unavoidable cause), to do a full day's work on every working day: and it was held, that the defendant was not obliged by this contract to employ the plaintiff at reasonable times for a reasonable number of working days during the term. In *Aspdin v. Austin*, 5 Q. B. 671, 1 Dav. & M. 515, by agreement between the plaintiff and defendant, the plaintiff agreed to manufacture for the defendant cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him 4*l.* weekly during the two years following the date of the agreement, and 5*l.* weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement,—each party binding himself in a penal sum to fulfil the agreement; and the defendant afterwards covenanted by deed for the performance of the agreement on his \*599] part: and it was held, that the stipulations in the \*agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, though the defendant was bound, by the express words, to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part. "Where," said Lord Denman, "parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by any implications: the presumption is, that, having expressed some, they have expressed all the conditions by which they intended to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted." *Dunn v. Sayles*, 5 Q. B. 685, 1 Dav. & M. 519, is to the same effect. These cases lay down a sound, clear rule of construction. [PARKER, B., referred to *Pilkingtton v. Scott*, 15 M. & W. 657.†] The subject underwent much discussion in *Elderton v. Emmens*, 4 C. B. 479 (E. C. L. R. vol. 56), and afterwards in error, 6 C. B. 160 (E. C. L. R. vol. 60).

As to the third plea. There is no allegation in the declaration that the defendants had notice that the plaintiffs were ready and willing to deliver the sleepers as to which that plea is pleaded; and, if it is to be

considered that the notice is impliedly alleged in the \*declaration, the traverse of that is found for the defendants. In contracts of [\*600 this kind, where performance of acts to be done on either side is to be contemporaneous, readiness and willingness must be averred: *Hannuc v. Goldner*, 11 M. & W. 849;† *Granger v. Dacre*, 12 M. & W. 431;† *Doogwood v. Rose*, 9 C. B. 132 (E. C. L. R. vol. 67). [PARKE, B.—The averment in the declaration to which the third plea addresses itself, was unnecessary. The plaintiffs were not bound to deliver until the company's engineer gave them notice.] They were bound to be ready to deliver when they should receive notice. [CROMPTON, J.—What quantity of sleepers were the plaintiffs bound to be ready to deliver?] Supposing no order to have been given down to the last day of the time stipulated for the delivery, they were bound to be ready to deliver the whole. [PARKE, B.—There clearly was no obligation on the plaintiffs to be ready to deliver any of the sleepers until the defendants gave them notice of the time and place where they chose to have them delivered. It is an idle averment and an idle traverse: and the plaintiffs are entitled to judgment non obstante veredicto upon it.]

*Willes* (with whom was *Bramwell*), contra.—In whatever part of the deed an intention appears that either party shall be bound to do an act,—whether in the recital, or in a covenant of the opposite party; whether it profess to be the express agreement of both, or the covenant only of the party himself who is sought to be charged,—if it does appear, either expressly or by fair and reasonable implication and intendment, that it is an act which is stipulated for at the time of the contract, it is equally binding upon him. Upon the fair construction of this deed, it is submitted that there is an express and positive agreement on the part of the company to take the whole number of 350,000 sleepers, and no less. The main feature of the contract is, that the quantity \*should [\*601 be received by the company, one-half in the year 1847, and the remainder by Midsummer, 1848. In *Sheppard's Touchstone*, p. 162, it is said: "There needs not formal and orderly words, as, covenant, promise, and the like, to make a covenant on which to ground an action of covenant; for, a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have this action upon the breach of the agreement. And therefore, if these words be inserted in a deed, amongst other covenants, that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessor [lessee] shall scour ditches, provided always that the lessor do carry away the earth; these are good covenants on both sides." Here, there is no qualification of the contract, so as to show any intention that the company should have the option of taking a less quantity. The deed begins with a recital that the company "are desirous of being supplied

with 850,000 sleepers:" it then goes on to say that the particular size and description of *the said sleepers* are set forth in the specification thereunto annexed, and that in the same specification are also set forth the several times within which, and the port at which, the same sleepers *will be required to be delivered*. We are therefore entitled to look at the specification, not merely for the purpose of showing the details, but also to show the purpose for which the contract was entered into. No discretion as to the quantum of the supply is vested in the engineer. The specification expressly says,—“The number of sleepers *required* under this specification, is, 350,000.” Throughout the contract, there is nothing to show that the company are to have the option to take any less than that number. “One half *will have to be delivered* in 1847, \*602] and the \*remainder by Midsummer, 1848.” What would be the use of inserting that, if the company had the option of taking all or none at their pleasure? The specification then goes on,—“The port at which the deliveries will have to be made, is, Goole.” Thus, the quantity, and the times and the place of delivery, are fixed. The contractors must necessarily make large disbursements in order to place themselves in a position to supply the number of sleepers contracted for. In such a contract one would naturally look for mutuality. Then come the conditions of payment,—acts to be done by the company. “Payments will be made monthly, within one month of the engineer’s certificate of each cargo.” [PARKE, B.—The provision as to payment is not incorporated in the contract; but only the quantities, size, shape, and times and place of delivery.] It is competent to the plaintiffs, in construing the contract, to look to any portion of the specification which tends to throw light upon the contract. [PARKE, B.—The reference to the specification does not make the whole of it part of the deed.] The recital states that the sleepers are to be delivered upon the terms mentioned in the specification. One of these is, the terms of payment. The provision as to the retention by the company of 2000*l.* of the price due to the contractors upon the engineer’s certificate, until two months after the whole of the 850,000 sleepers “hereinbefore agreed to be supplied by the said contractors shall have been supplied,” affords a further and an irresistible argument that all parties contemplated and intended that the whole number of sleepers contracted for were to be delivered within the time specified. [MARTIN, B.—The plaintiffs never could get that 2000*l.* until the whole 850,000 sleepers had been delivered and accepted.] And that appears in a clause which follows clauses which clearly relate to matters of mutual agreement. \*608] \*Another provision in the deed which is totally irreconcilable with the argument on the other side, is, that, in a certain event, the company shall be at liberty to put an end to the contract otherwise than by their engineer’s abstaining from giving notice. The defendants expressly covenant to pay the plaintiffs, “for and in respect of *the said*

*sleepers hereinbefore contracted to be supplied*, the price of 4s. 8d. per sleeper." The engineers, it is said, are invested with a discretion: but the only discretion they have, is, as to the proportions, and the periods, within the prescribed limits, at which the sleepers shall be supplied. [PARKE, B.—The defendants contend that the breach is bad, because it does not aver that a reasonable time had elapsed after they had notice of the plaintiffs' readiness and willingness to deliver the sleepers.] The first breach is, that the engineer of the company did not in or during the year 1847, or at any time, make or give to the plaintiffs any order or requisition touching or concerning the first half of the sleepers to be delivered in that year, or the manner, time, or quantity in which the said half of the said sleepers, or any part thereof, was to be delivered. That involves a denial that the company's engineer gave any order or direction for the extension of the time of delivery. The power reserved to the company to extend the time is in the nature of a condition subsequent or proviso: it was for them to show that the period for delivery had been extended. In this respect the case resembles *Hotham v. The East India Company*, 1 T. R. 688, where it was held, that a covenant in a charter-party "that no claim should be admitted, or allowance made for short tonnage, *unless* such short tonnage be found and made to appear on arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendants; and that the absence of an averment of performance is no ground for arresting the judgment. "Any words in a deed which show an agreement to do a thing, make a covenant:" Com. Dig. *Covenant* (A. 2). The relative position of the words is matter of indifference. Thus, in *Stevinson's Case*, 1 Leon. 324, "in debt upon a bond, the condition was, that whereas the plaintiff had covenanted with the defendant that it should be lawful for the defendant to cut down wood for fire-boot and hedge-boot, without making any waste, or cutting more than necessary; and the plaintiff assigned the breach in that covenant (which is in truth the covenant of the plaintiff), that the defendant had committed waste in felling wood, &c.: and exception was taken, because that the condition ought to extend but unto covenants to be performed on the part of the lessee; but the exception was not allowed, for, it is the agreement of the lessee, although it be the covenant of the lessor, the plaintiff." In *Saltoun v. Houstoun*, 1 Bingh. 483 (E. C. L. R. vol. 8), 8 J. B. Moore, 546 (E. C. L. R. vol. 17),—a case which has always been cited with approbation,—by indenture between S. F. sen. of the first part, S. F. jun. of the second part, and J. H. H. on the third part, it was agreed that S. F. sen. should retire from business, and S. F. jun. and J. H. H. become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which S. F. sen. should

advance for S. F. jun., and 12,000*l.* was to be advanced by J. H. H. The deed then proceeded,—“And whereas an account of all the debts of S. F. sen. in his business of merchant has been this day taken, and the balance in his favour amounts to 38,033*l.*; and *whereas it has been agreed by and between S. F. sen. and S. F. jun. and J. H. H., that the whole of the debts and credits of S. F. sen. shall be received and paid by S. F. jun. and J. H. H.,* and that the balance of 38,033*l.* shall be accounted for and \*605] paid by them in \*manner hereinafter mentioned; and S. F. sen. by indenture hath assigned the debts and credits to them; this indenture further witnesseth, that it is agreed, that, in consideration of 12,000*l.* paid to S. F. sen. by J. H. H., and for raising 24,000*l.* as S. F. junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.*, is to be retained by S. F. jun. and J. H. H., and the remaining 2033*l.* paid to S. F. sen., by instalments at six, twelve, and eighteen months; and, if any of the debts shall prove bad, the loss shall be borne by S. F. jun. and J. H. H. It was held, that this deed amounted to a covenant by S. F. jun. and J. H. H. to pay the debts due from S. F. sen. in his business at the date of the indenture. Lord Gifford, in giving judgment, there said: “It is admitted, that, in order to constitute a covenant, it is not necessary the word covenant should be expressly employed; and, if it were necessary to refer to cases in support of so clear a position, I might refer to *Stevinson's Case*. The same principle was laid down in *Hollis v. Carr*, 2 Mod. 87, where Finch, L. C., says, ‘There are many cases where words will make a covenant because of the agreement, where the general words of *covenant, agreement, &c.*, are wanting; as, *yielding and paying* will make a covenant.’ And he held that articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, and concluding thus, —‘And it is hereby agreed that a fine shall be levied to secure the payment of the said portion,’—amounted to a covenant.” So, in *Sampson v. Easterby*, 6 Bingh. 644 (E. C. L. R. vol. 19), 4 M. & P. 601,(a) where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds, for pulling down an old smelting-mill, and building another of larger dimensions upon a waste near the mines, and \*606] the lease \*contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to *build* it,—it was held that such a covenant was to be implied, and that the lessor of the one-third might sue upon it in respect of his interest. In *Dallman v. King*, 5 Scott, 382, 4 N. C. 105, the plaintiff became tenant to the defendant of certain premises at the yearly rent of 250*l.* By the agreement, it was stipulated that the tenant should make certain alterations and do certain repairs within the first year, to an amount not less than 200*l.*; such repairs, &c., “to be

(a) See *Easterby v. Sampson*, 9 B. & C. 505 (E. C. L. R. vol. 17), 4 M. & P. 422.

inspected and approved of" by the landlord, and "to be done in a substantial manner." And it was agreed that the tenant should be allowed the sum of 200*l.* towards such repairs, &c., and should be at liberty to retain the same out of the first year's rent of the premises. And it was held that the landlord's approval was not a condition precedent to the tenant's right to retain the 200*l.* Again, in *Cannock v. Jones*, 3 Exch. 283,† a farming lease contained the two following clauses,—first, "the said S. C. (the lessee) doth hereby covenant with E. J. (the lessor) in manner following, that he the said S. C. shall from time to time and at all times during the continuance of the term hereby granted, at his own costs and charges, in all things well and sufficiently repair and glaze the windows of the said messuage, and also the hedges, ditches, &c., of and belonging to the said demised premises, and all fixtures, additions, and improvements thereto, during the said term, in and by and with all and all manner of needful and necessary reparations, cleansings, and amendments, when and as often as occasion shall require, *the said farmhouse and buildings being previously put in repair and kept in repair by the said E. J.:*" the second clause was as follows,—"*And it is hereby agreed by and between the said parties hereto, that the said E. J. shall and will, within eighteen months from the date of the lease, erect and build (inter alia) a new shed and stalls \*for feeding cattle, complete, at the upper end of the barn, &c.; and the whole of which is* [\*607 agreed to be left to the superintendence of the said C. S., and E. J., her son:" and the Court of Exchequer held that the latter words in the first clause amounted to an absolute and independent covenant on the part of E. J., to put the premises into repair; and that the provision in the latter clause, that the work should be left to the superintendence of S. C. and the son of E. J., was not a condition precedent to, or concurrent with, the covenant by E. J. to the work. [PARKER, B.—That decision has been affirmed in the House of Lords. All these cases well illustrate the general principle of construction of covenants. But, after all, the real question here, is, whether you can collect from the words of this deed a covenant or agreement on the part of the company to take,—not a mere hope or expectation that they will take,—the whole 350,000 sleepers within the stipulated time.] The cases above cited at all events show that it is not essential that such agreement should be found in so many words, or even in that part of the deed which purports to contain the covenants of the company, as the argument on the other side assumes. It is enough if it can be fairly collected from all parts of the deed that such was the intention of the parties.

*Bovill*, in reply.—It is conceded that there is no covenant in terms by the company to the effect contended for by the plaintiffs. It lies on them to show that such a covenant is to be implied from the whole scope of the deed. It is not by elaborate and astute argument and criticism that such a result ought to be arrived at. If instruments of



this sort are to be construed by such refinements, every case, like *Can-nop v. Jones* and *Elderton v. Emmens*, 6 C. B. 175 (E. C. L. R. vol. 60), will find its way to the House of Lords. Nothing will justify the \*608] court in \*inferring a covenant which the parties have not thought fit to express for themselves. "Where," as Lord Denman observes in *Aspdin v. Austin*, "parties have entered into written engagements, with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." It is said that the reservation of power in a given event to determine the contract, and the stipulation that 2000*l.* of the money payable under the contract shall be retained by the company until all the sleepers have been delivered, create an ambiguity; and it is sought thence to infer a covenant that the whole shall be delivered at all events. The argument as to the first assumes that the engineer is the agent or servant of the company. That, however, is not so: he is for this purpose a referee who is to arbitrate between the parties. The clause as to determining the contract, empowers the company to do so in defiance of their engineer. No inference favourable to the plaintiffs can fairly be drawn from the agreement to retain 2000*l.* [WIGHTMAN, J.—It certainly does create great difficulty in my mind.] A covenant to pay the 2000*l.* on the happening of certain events, does not necessarily import a covenant that those three events,—that the whole 850,000 sleepers shall be delivered, that the engineer shall certify, and that the accounts shall have been adjusted,—shall happen. The court cannot judge what is reasonable between the parties in circumstances like these. [PARKE, B.—My opinion will be founded upon the words of the deed. I endeavour always, and always will, to construe every instrument,—be it deed, or will, or act of parliament,—by what I conceive to be the meaning of the words used. The common phrase "intention of the parties," is an expression which is very loose, and calculated to mislead.]

\*609] \*PARKE, B.—I am of opinion, and the rest of the court concur with me,—though during the course of the argument I entertained some doubt,—that the judgment of the Court of Common Pleas is correct and must be affirmed. No particular form of words is necessary to form a covenant: but, wherever the court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument. Apply that rule to the present case, and see if the contract imports a covenant on the part of the company to take the whole number of 850,000 sleepers, and whether it implies a covenant on their part that their engineer shall make any order or requisition in writing concerning the delivery of the sleepers, or the manner, time, or quantity in which

they are to be delivered. We all concur in thinking, that, upon a reasonable construction of the whole instrument, it may fairly be made out that there is a covenant on the part of the company to take all the 350,000 sleepers before Midsummer, 1848. We must look at the recitals of the deed, which refer to the specification. In construing it, we are not to incorporate the whole of the specification or of the tender, but only so much thereof as the deed refers to. I think there is enough upon the face of it to constitute a covenant. It begins with a recital that the company "are desirous of being supplied with 350,000 sleepers." If the words had been "have agreed to take 350,000 sleepers," there would have been an end of the argument: but, if the deed goes on to show that such was the intention of the parties, and it is sufficiently made out by the language they have subsequently used that the company have agreed to require that quantity, it will equally constitute a covenant on their part to take them. The recital goes on,—“and whereas the particular size and description of *the said sleepers* are set forth \*in [the specification hereunto annexed or hereunder written, and in certain drawings therein referred to; and in the same specification are also set forth the several times within which, and the port at which, the same sleepers *will be required* to be delivered.” That incorporates in the deed so much of the specification as relates to the times and port of delivery. It is the same as if they had said in terms,—“one half of the said sleepers will be required to be delivered in 1847, and the remainder by Midsummer, 1848, at the port of Goole.” That being so, there is undoubtedly sufficient to import an agreement on the part of the company that that quantity is to be required. Then follow certain covenants on the part of the contractors,—that they shall and will, “within the times and at the place mentioned in the specification, as and when, and in such quantities, and in such manner, as the engineer of the company shall, by order or requisition in writing under his hand, from time to time, or at any time within the period limited in and by such specification, direct or require, furnish and supply the company with 350,000 sleepers,” of a given description. It then goes on to provide, “that, in case the engineer of the company shall, at any time before complete execution of the contract by the delivery of the whole number of 350,000 sleepers (that is to say, on or before the 29th of June, 1848), be desirous of altering the size, form, or construction of, or of varying the times of delivery of any of the said sleepers which shall not then have been delivered,” a corresponding alteration shall be made in the price. Then follow certain parts of the instrument which are not material to be mentioned: and then comes a clause which proves to demonstration that the company understood themselves to be contracting to receive the whole quantity of 350,000 sleepers within the times limited. “That, in case the contractors, their executors, &c., shall

\*611] \*not regularly deliver the said sleepers in such quantities and at such times and place as are or is herein agreed upon, to the satisfaction of the engineers of the company, *according to this contract*, or shall from any cause whatsoever other than the acts of the said company, or their agents, be prevented from making such delivery or deliveries as aforesaid, according to this present contract, and if such default, impediment, or delay shall continue for the space of fifteen days next after notice in writing, signed by the secretary of the said company, or by their engineer, requiring them to put an end to such default, impediment, or delay, shall have been given to the said contractors, or if they the said contractors, before the completion of this contract, shall be declared bankrupt or insolvent, then and in any of such cases it shall be lawful for the company, if and as they shall think proper, by writing under the hand of their secretary, absolutely to determine this contract." Is not that just as if the company had in so many words recited that this is their contract? And, if it be their contract, it is clearly a contract on the one side to deliver, and on the other to receive, the entire number of sleepers mentioned in the recital and in the specification. It has been suggested by Mr. Bovill, that the engineers are for the purpose of determining the matters to be referred to them, in the position of arbitrators between the parties, and not of agents to the company. But, what is the reasonable construction of the whole instrument? Obviously it is, that the company contract to receive the whole number of 350,000 sleepers, subject, as to their form and times of delivery, to the directions of their engineers, with power to the company in a certain event to determine the contract. The engineers are their agents. It may be, that, as to certain matters they may be constituted in some degree arbitrators between the parties: but, as to regulating the size and form

\*612] of \*the sleepers, and the times and place of delivery, they clearly are agents of the company, and nothing else. As far as concerns the contractors, it is not reasonable to suppose that they would covenant to lay out large sums in the purchase of timber, unless they understood the company to be bound to take the whole number contracted for. The company engage to pay the contractors for or in respect of "the said sleepers hereinbefore contracted to be supplied," upon the certificate of their engineer of the due delivery of each cargo. That imports a recognition on their part that there is a contract to take the 350,000 sleepers. And this construction is greatly fortified by the proviso as to the retention by the company of 2000*l.* of the price agreed on, until after the whole quantity shall have been supplied to the satisfaction of the engineer: and that proviso is the language of both parties. At least it amounts to a covenant by the company that they will take sleepers to an extent exceeding that sum. The construction contended for by the company would keep the plaintiffs out of this 2000*l.* for ever; which is manifestly absurd. Giving, therefore, all due weight to

the ingenious criticisms on this deed, we think there is abundantly sufficient upon the face of it to show that the company have contracted to take the whole 350,000 sleepers.

The only remaining question is, whether the company have bound themselves to order the whole number within the time limited. The engineers being the agents of the company, we think the contract necessarily imports that they will give the requisite orders to their engineers, so as to enable the contractors to deliver the whole before Midsummer, 1848. It has been strongly urged that that view is inconsistent with the power reserved to the engineers to extend the time for delivery. We are all now satisfied that the reasonable construction of that clause, is, that the engineers shall have \*power to extend the times of delivery only within the limits mentioned in the contract, viz. [\*613 Midsummer, 1848. The contract would not be executed in terms without delivering the whole number by that time.

We are therefore of opinion that the breach is well assigned, and that the plaintiffs below are entitled to judgment on this point, as well as to judgment non obstante veredicto on the third issue. Consequently, the judgment of the court below will be affirmed.

Judgment affirmed.

#### END OF TRINITY VACATION.

#### \*MEMORANDA.

[\*614

On the first day of Michaelmas Term, *Robert Matthews*, of the Middle Temple, Esq., and *Ralph Thomas*, of the Middle Temple, Esq., who had, in the course of the preceding vacation, been called to the degree of the coif, took their seats within the Bar.

They gave rings with the motto,—“Hoc age.”

On the 18th of November,—the day appointed for the public funeral of His Grace, the Duke of Wellington,—there were no sittings in any of the courts at Westminster.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF COMMON PLEAS,**  
**IN**  
*Michaelmas Term,*  
**IN THE**  
**SIXTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.**

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The Judges who usually sat in banc in this Term were :

JERVIS, C. J.  
MAULE, J.

WILLIAMS, J.  
TALFOURD, J.

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**TABLE OF FEES**

**TO BE TAKEN AT THE OFFICES OF THE SUPERIOR COURTS, AND AT THE  
JUDGES' CHAMBERS, AS SETTLED BY THE JUDGES.**

In pursuance of an act passed in the session of parliament held in the fifteenth and sixteenth years of the reign of Her Majesty, c. 23, intituled "An act to make provision for a permanent establishment of officers to perform the duties at Nisi Prius, in the superior courts of common law, and for the payment of such officers, and of the judges' clerks, by salaries, and to abolish certain offices in those courts," We, the undersigned, being two of the commissioners of Her Majesty's Treasury, have caused the under-mentioned tables of fees to be \*616] \*prepared, specifying the fees proper to be demanded and taken in the offices under mentioned, and at the judges' chambers, in the superior courts of common law; and [direct] that all other fees in such offices and chambers shall be abolished, namely :—

*Offices of the Masters of the three Superior Courts.*

	£	s.	d.
Every writ (except writ of trial or subpoena) . . . . .	0	5	0
Every concurrent, alias, pluries, or renewed writ . . . . .	0	2	6
Every writ of trial . . . . .	0	2	0
Every writ of subpoena before a judge or master . . . . .	0	2	0
before the sheriff . . . . .	0	1	0
Every appearance entered . . . . .	0	2	0
each defendant after the first . . . . .	0	1	0
Filing every affidavit, writ, or other proceeding . . . . .	0	2	0
Amending every writ or other proceeding . . . . .	0	2	0
Every ordinary rule . . . . .	0	1	0
Every special rule, not exceeding six folios . . . . .	0	4	0
exceeding six folios, per folio . . . . .	0	0	6
<i>Note.</i> Plans, sections, &c., accompanying rules, to be paid for by the party taking the rule, according to the actual cost.			
Every judgment by default . . . . .	0	5	0
Every final judgment, otherwise than judgment by default . . . . .	0	10	0
Taxing every bill of costs, not exceeding three folios . . . . .	0	2	0
exceeding three folios, when taxed as between party and party, per folio . . . . .	0	0	6
*617] *Taxing every bill of costs, exceeding three folios, when taxed as between attorney and client, or where the attorney taxes his own bill, per folio . . . . .	0	1	0
Every reference, inquiry, examination, or other special matter referred to the master, for every meeting not exceeding one hour . . . . .	0	10	0
for every additional hour, or less . . . . .	0	10	0
Upon payment of money into court, viz. for every sum under 50 <i>l</i> . . . . . 50 <i>l</i> . and under 100 <i>l</i> . . . . . 100 <i>l</i> . and above that sum . . . . .	0 0 1	5 10 0	0 0 0
Every certificate . . . . .	0	1	0
Office copies of præcipe or other proceedings, per folio . . . . .	0	0	6
Every search, if not more than two terms . . . . .	0	0	6
exceeding two, and not more than four terms . . . . .	0	1	0
exceeding four terms, or a general search . . . . .	0	2	6
Every affidavit, affirmation, &c., taken before the master . . . . .	0	1	0
Filing every recognisance or security in ejectment or error . . . . .	0	2	6
Every allowance and justification of bail . . . . .	0	3	0
For taking special bail as a commissioner . . . . .	0	2	0
Filing affidavit, and enrolling articles previous to the admission of an attorney . . . . .	0	5	0

	£	s.	d.
Every re-admission of an attorney . . . . .	0	5	0
All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the masters' offices under any pretence whatever.			
<b>*618] *Offices of the Associates to the three Chief Judges.</b>			
Every record of Nisi Prius delivered to the associate to be entered for trial . . . . .	1	5	0
Every trial of a cause, from plaintiff . . . . .	1	0	0
from defendant . . . . .	0	15	0
If the trial continues more than one day, then for every other day, from plaintiff and defendant, each . . . . .	0	10	0
Returning the postea . . . . .	0	5	0
Every cause made remanet at the instance of the parties, to be paid by plaintiff or defendant, as the case may be . . . . .	0	10	0
Every cause withdrawn, to be paid by the party at whose instance it is withdrawn . . . . .	0	5	0
Re-entering every record of Nisi Prius made remanet, &c. . . . .	0	2	0
Every reference from plaintiff and defendant, each . . . . .	0	5	0
Every amendment of any proceeding whatever . . . . .	0	2	0
Every order or certificate . . . . .	0	5	0
Every special case or special verdict, in addition to the charge for engrossing and copying, at the rate of 4d. per folio, from plaintiff and defendant, each . . . . .	0	10	0
Attending any court or otherwise, with any record or other proceeding under writ of subpoena or special order of court, per day . . . . .	1	0	0
All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the associates' offices, under any pretence whatever.			
<b>*619] *Chambers of the Chief and Puisne Judges.</b>			
Every summons to try an issue before the sheriff . . . . .	0	1	0
Every other summons whatever, whether in term or vacation . . . . .	0	2	0
Every order to try an issue before the sheriff . . . . .	0	1	0
Every other order whatever of an ordinary nature . . . . .	0	2	0
Every order of a special nature, such as, reference to arbitration, or attendance of witnesses at arbitration,—service of process on persons residing abroad,—reference to the master to fix sum for final judgment,—revival of judgment, and the like . . . . .	0	5	0
Every fiat, warrant, certificate, caveat, special case, special verdict, or the like . . . . .	0	5	0

	£.	s.	d.
Every affidavit, affirmation, &c., whether in term or vacation, each deponent . . . . .	0	1	0
Every affidavit kept for the purpose of being conveyed to the proper office to be filed . . . . .	0	1	0
Every proceeding filed . . . . .	0	2	0
Every admission of an attorney . . . . .	1	0	0
Every approbation of commissioners for taking affidavits on special bail . . . . .	0	2	6
Every commission for taking affidavits or special bail, exclusive of stamp-duty, engrossing, and sealing . . . . .	1	0	0
Every other commission, for any purpose whatever, exclusive of stamp-duty, engrossing, and sealing . . . . .	0	10	0
Every acknowledgment by married women . . . . .	0	10	0
Office copies of judges' notes, or of any other proceeding whatever, per folio . . . . .	0	0	6
*620] *Every recognisance or bond of any description whatever . . . . .	0	10	0
Every allowance of writ of error . . . . .	0	10	0
Bail on cepi corpus, habeas corpus, error, or judgment . . . . .	0	2	0
Delivering bail-piece off the file, or justification of bail . . . . .	0	2	0
Every committal . . . . .	0	5	0
Every exhibit signed by a judge . . . . .	0	1	0
Producing judges' notes . . . . .	0	5	0
Bill of exceptions signed by judge . . . . .	0	5	0
Order in legacy-duty cases . . . . .	0	5	0
Crown revenue cases, from defendant . . . . .	0	5	0
Attendance in any court or otherwise, under subpoena or special order of court, to give evidence or produce documents, per day . . . . .	1	0	0
Attendance as a commissioner to take affidavit, &c., or at a judge's house, or elsewhere, at request of parties . . . . .	0	10	0
Appointment of commissioners under glebe-exchange . . . . .	1	0	0
Allowance of by-laws or table of fees . . . . .	1	0	0
Report on private bill . . . . .	5	0	0
Attendance by counsel, each side . . . . .	0	5	0

*Note.* All plans, sections, &c., accompanying any order or office-copy, to be paid for by the party, according to the actual cost.

In cases where the party has been allowed to sue in formâ pauperis, the fees are not to be demanded or taken, nor in cases where such fees would be payable by any revenue or other government department.

All other fees than those before mentioned, are abolished, and are not to be taken by any \*person at the judges' chambers, under any other pretence whatever. [\*621



Given under our hands, at the Treasury Chambers, Whitehall, this 20th of November, 1852.

CHANDOS,  
THOMAS BATESON,  
Two of the commissioners of Her  
Majesty's Treasury.

We, the undersigned judges of the superior courts of common law, do settle, allow, and sanction the before-mentioned table of fees prepared by the commissioners of Her Majesty's treasury; and we do hereby establish the same, under the provisions of the aforesaid act.

Dated the 22d day of November, 1852.

CAMPBELL, Lord Chief Justice of the Court of Queen's Bench.

JOHN JERVIS, Lord Chief Justice of the Court of Common Pleas.

FRED. POLLOCK, Lord Chief Baron of the Court of Exchequer.

W. H. MAULE,

E. V. WILLIAMS,

T. N. TALFOURD,

} Judges of the Court of Common Pleas.

The before-mentioned tables of fees having been sanctioned and allowed by the Lord Chief Justices, the Lord Chief Baron, and other Judges as required by the said act, we do hereby order that the said tables of fees be inserted and published in the London Gazette.

Treasury Chambers, Whitehall, the 22d of November, 1852.

CHANDOS,  
THOMAS BATESON,  
Two of the commissioners of Her  
Majesty's Treasury.

## \*REGISTRATION APPEALS.

[\*622

## City of WESTMINSTER.

WILLIAM SIMPSON FORD, Appellant; FRANCIS SMEDLEY,  
Respondent. Nov. 12.

Assessed taxes are (by the 43 G. 3, c. 161, s. 23) *payable quarterly*, though, by the 48 G. 3, c. 141, the collectors are directed to collect them, and they are accordingly usually collected *half-yearly*.

Where, therefore, a house-tax was *payable* on the 20th of December, 1851, but not *demand*ed until the 11th of April, 1852, and the party assessed did not pay it until after the 20th of July:—Held, that he had not, within the meaning of the 11 & 12 Vict. c. 90, “paid, on or before the 20th of July, all assessed taxes which became *payable* from him in respect of the premises previously to the 5th of January,” and consequently that he was not entitled to be registered.

THE appellant claimed, in respect of certain property occupied by him in the parish of St. Clement Danes, to have his name inserted in the list of persons entitled to vote at the election of members to serve in parliament for the city of Westminster. His claim was free from all objection except one, viz., that he had made default in payment of assessed taxes.

Under the reform act, 2 W. 4, c. 45, no person could be put upon the register, unless he had paid, on or before the 20th of July, all assessed taxes which should have become payable from him in respect of the premises previously to the 6th of April then next preceding.

By the 11 & 12 Vict. c. 90, the period of permissible arrears is enlarged; for, by that act, it is sufficient if the claimant hath paid, on or before the 20th of July, all assessed taxes which shall have become payable from him in respect of the premises previously to the 5th of January in the same year.

Assessed taxes the revising barrister conceived to be payable quarterly,—on the 20th of June, the 20th of September, the 20th of December, and the 20th of March, in each year.

The instructions to the collectors represent the assessed taxes as payable quarterly, and require them to be collected and recovered forthwith, whenever there is *\*danger* that a tax may be lost. [\*623 A copy of these instructions was laid before the revising barrister; and it appeared by them, and from other evidence, that, to save expense, and to promote convenience, assessed taxes, although payable quarterly, are in general collected only half-yearly, by equal moieties, at Michaelmas, and at Lady-Day.

It was proved that the collectors always received quarterly payments voluntarily tendered, and for such quarterly payments gave quarterly discharges.

The appellant was returned a defaulter, under the 12th section of

the registration act, 6 & 7 Vict. c. 18, for not having paid, on or before the 20th of July, 1852, the quarterly house-tax of the 20th of December, 1851; and, in point of fact, it was proved that he did not pay that tax until the 30th of July, although the same was demanded of him on the 10th of April.

The revising-barrister held that the quarterly house-tax of the 20th of December, 1851, was, under the 11 & 12 Vict. c. 90, payable from the appellant "previously to the 5th of January last;" and, as he had allowed the 20th of July to expire without satisfying the demand, the revising-barrister rejected his claim.

The appellant urged, that, inasmuch as the quarterly house-tax of the 20th of December was not actually demanded previously to the 5th of January, it was therefore not payable previously to that day: but the revising-barrister did not assent to that proposition.

The appellant further urged that it was enough for him to have paid his assessed taxes down to the 20th of September: but the revising-barrister held the contrary.

If the court should be of opinion, that, under the circumstances stated, it was not necessary for the appellant to have paid, on or before the 20th of July, the house-tax of the 20th of December last, he would \*624] in that \*event be entitled to have his name inserted in the said list of voters for the city of Westminster.

*Kinglake*, Serjt. (with whom was *D. Keene*), for the appellant.—The question is, whether there has been a due payment of assessed taxes by the claimant, within the 2 W. 4, c. 45, s. 27.

1. The house-tax, not having been demanded previously to the 5th of January, was not so payable as to make its non-payment a default on the part of the appellant. The question depends upon the construction of certain acts of parliament. By the 1st section of the 43 G. 3, c. 99, it is enacted that all duties now under the management of the tax-office (except land-tax), shall be levied under the regulations of that act. By section 12, the assessors are required to make and deliver certificates of assessment of all the duties given to them in charge, to the commissioners, on or before the 5th of June yearly; and the commissioners are to sign and seal three duplicates of the assessments, and to deliver one of them to the collector, together with warrants for collecting the same: "and the said collectors are hereby enjoined and required to make demand of the several sums contained in such duplicates, from the parties charged therewith, or at the places of their last abode, or on the premises charged with the assessment, as the case may require, within ten days after the said duties shall respectively become payable, next after such assessments shall have been delivered to them." The 23d section of the 43 G. 3, c. 161, enacts "that every assessment to be made of the said duties in pursuance of this act, in England, Wales, and Berwick-upon-Tweed, shall be in force for one whole year

commencing from the 5th of April in the year in which the same shall be made, and ending on the 5th of April then next following, *and the said several duties shall be paid by quarterly instalments* on the days \*hereinafter mentioned, that is to say, on the 20th of June for [\*625 the quarter commencing from the 5th of April and ending on the 5th of July, the 20th of September for the quarter commencing from the 5th of July and ending on the 10th of October, and the 20th of December for the quarter commencing from the 10th of October and ending on the 5th of January, and the 20th of March for the quarter commencing on the 5th of January and ending on the 5th of April in every year, the first payment thereof to be made on the 20th of June, 1804; and it shall be lawful for the respective commissioners, or any two or more of them, and they are hereby required, as soon as the assessment shall be made, to issue out and deliver to the respective collectors their warrants for the speedy and effectual levying and collecting the said duties, as the same shall become payable *by quarterly instalments as aforesaid.*" The 24th section has reference to assessments in Scotland, as to which the language and the machinery are totally different: there, the payments are to be made half-yearly, and at the office of the collector. Then comes the 48 G. 3, c. 141, which contains rules and regulations for assessments and collections. Rule 3 of the 3d division provides that the duties "shall be collected and levied *in moieties*, on the days hereinafter mentioned, that is to say, one moiety of the duties of assessed taxes, if not sooner paid or satisfied according to the directions of the said acts respectively, shall be collected or levied before the 10th of October in each year of assessment, or within twenty-one days thereafter, and the other moiety thereof before the 5th of April following, or within twenty-one days thereafter." Then comes a proviso, which will probably be relied upon on the other side, as showing, that, notwithstanding the direction to collect *half-yearly*, yet the collector *may* still exercise the powers given by the former acts, and collect \**quarterly*,—[\*626 "Provided always, that nothing herein contained shall be construed to alter the times or proportions at which the said duties are payable, according to the directions of the said acts respectively, or in any way to impeach or affect the powers or provisions of the said acts for the recovery of the said duties at such times and in such proportions as are therein prescribed; and the said respective duties shall be deemed payable quarterly at the times mentioned in the said acts, by four instalments; and it shall be lawful to demand, receive, or levy the same according to the said acts, anything herein contained to the contrary notwithstanding." The meaning of that is, that, for all ordinary purposes, the collection is to be made by half-yearly instalments; but that the provisions of the former acts are to be kept alive for cases of emergency. [JERVIS, C. J.—The case is rather confused in this respect. The revising-barrister finds as a fact that the assessed taxes, although

payable quarterly, are collected only half-yearly.] It possibly would have been more correct to have made the instructions to the collectors part of the case. These show how the statutes have practically been put in force. Applying that to the words of the 27th section of the 2 W. 4, c. 45,—“all taxes which shall have become payable,”—they ought fairly to be interpreted to mean, not payable legally, but collectable upon a demand for non-compliance with which the voter would be deemed a defaulter. Under the Irish reform act, 2 & 3 W. 4, c. 88, s. 7, where the words are, “legally due and payable,” the practice has been to require a proper demand on the voter.

2. Should the court consider itself bound by the strict letter of the statutes to hold that “payable” means payable quarterly,—for the purpose of disfranchising the voter, the taxes can hardly be said to be payable until they have been duly demanded. Under the 43 \*G. 3, \*627] c. 99, s. 12, the collectors are expressly *enjoined* and *required* to make demand: and, by s. 33, it is only upon the party’s refusal to pay “upon demand made by the collector, according to the precepts or estreats to him delivered by the commissioners,” that power is given to distrain for the amount. The whole machinery of the collection contemplates a demand. [JERVIS, C. J.—It may be that a demand is necessary before enforcing payment by a distress. MAULE, J.—Do you contend that the taxes are not “payable” until the commissioners have delivered out their precepts or estreats?] This right of voting is a substitution for the right of scot and lot voting; and it has been decided, that, where the right of voting for a member to serve in parliament was in the inhabitant householders paying scot and lot, one who had been an inhabitant, and had paid poor’s rates for many years, was entitled to vote, although the poor’s rates for three-quarters of a year were in arrear at the commencement of the election,—no personal demand of the rates having been made upon him, and no *written* demand having been left at his house: Cullen v. Morris, 2 Stark. N. P. C. 577. [JERVIS, C. J.—There, no period of payment was fixed.] The rate is payable when made and duly published.

*Wordsworth*, for the respondent, referred to *The King v. Ford*, 2 Ad. & E. 588 (E. C. L. R. vol. 29), 4 N. & M. 451 (E. C. L. R. vol. 80), where it was held, that the demand required by the 43 G. 3, c. 99, s. 33, previously to a distress being levied for assessed taxes, need not be made in writing, nor personally on the party from whom they are due; but that it is sufficient if a demand has in fact been made, and there has been a refusal, on the ground of inability, or for any other cause, to pay. He was stopped by the court.

\*628] JERVIS, C. J.—I am of opinion that the \*revising-barrister has put a correct construction upon the statutes relating to the assessed taxes, and has properly rejected the appellant’s vote. The question is whether the house-tax mentioned in the case was due and

payable on the 20th of December, 1851, or on the 20th of March, 1852, or only on demand. If you look carefully at the various acts, no difficulty at all arises: the whole scheme is plain and intelligible. By the 12th section of 43 G. 3, c. 99, the assessments were to be made yearly, and the collectors were required to make demand from the parties charged therewith within ten days after the duties respectively became payable. By the 23d section of the 43 G. 3, c. 161, it is enacted that the duties shall be paid by *quarterly* instalments, "on the 20th of June for the quarter commencing from the 5th of April and ending on the 5th of July, the 20th of September for the quarter commencing from the 5th of July and ending on the 10th of October, and the 20th of December for the quarter commencing from the 10th of October and ending on the 5th of January, and the 20th of March for the quarter commencing on the 5th of January and ending on the 5th of April in every year." In order to avoid what might appear to be a hardship, by enabling the collector to pounce upon the parties without notice, the 33d section provides that a *demand* shall be made before a distress shall be levied for non-payment. Then the 48 G. 3, c. 141, which directs the mode of collecting, provides that the duties "shall be collected and levied in *moieties*, on the days hereinafter mentioned, that is to say, one moiety of the duties of assessed taxes, *if not sooner paid or satisfied according to the directions of the said acts respectively*, shall be collected or levied before the 10th of October in each year of assessment, or within twenty-one days thereafter, and the other moiety thereof, before the 5th of April following, or within twenty-one days thereafter;" and, to avoid all ambiguity, there is an express [\*629 proviso, "that nothing herein contained shall be construed to alter the times or proportions at which the said duties are payable according to the directions of the said acts respectively, or in any way to impeach or affect the powers or provisions of the said acts for the recovery of the said duties at such times and in such proportions as are therein prescribed, and the said respective duties shall be deemed payable *quarterly* at the times mentioned in the said acts, by four instalments; and it shall be lawful to demand, receive, or levy the same according to the said acts, anything herein contained to the contrary notwithstanding." It is said that the words of this proviso lead to the inference that the time of levy and payment are identical, that is, after the expiration of each half-year. The answer to that, however, is, that a levy supposes a compulsory payment, and a payment compulsorily enforced supposes a previous demand; the 33d section, which gives the power of distress, requiring a previous demand. The duties are payable quarterly, though not enforceable by distress without a previous demand. Therefore, the appellant in this case was clearly a defaulter, and the decision of the revising-barrister right.

MAULE, J.—I entirely agree with the Lord Chief Justice in the con-

struction which he has put upon the statutes. To entitle the party to the franchise, he must have paid on or before the 20th of July all assessed taxes which shall have become payable from him in respect of the premises, previously to the 5th of January, in the same year. The question is, what taxes became payable here before the 5th of January, 1852. That depends upon the words of the acts of parliament which have been referred to. The 43 G. 3, c. 161, s. 23, in express terms provides that the assessed taxes shall be paid by quarterly instalments. \*630] By the subsequent act, 48 G. 3, \*c. 141, the collector is directed to collect the duties half-yearly, though there is nothing to prevent him from receiving them quarterly. That is the clear, simple, plain sense of the words; and that sense must be given to them, unless it is impossible so to understand them without such a degree of inconvenience resulting from such a construction as to warrant us in departing from the ordinary sense of the words. I see no such urgent necessity here. And I doubt whether *anything* would justify us in holding that "paid and payable" means something else. Where an act of parliament says that a tax shall be payable in December, and another says that all taxes payable before January shall be paid on or before the 20th of July, the words must be read in their plain and ordinary sense. I think the appellant in this case has not complied with the condition which the legislature has imposed upon his right to vote, and consequently that the revising-barrister has properly withheld his name from the register.

TALFOURD, J.—I am entirely of the same opinion. The words are so plain that I can conceive nothing that would justify us in construing them as my Brother Kinglake has contended they ought to be construed.  
Decision affirmed, with costs.

\*681]

\*CUMBERLAND—Eastern Division.

JOHN HAMILTON, Appellant; WILLIAM BASS, Respondent.

Nov. 12.

A. was registered as a county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of 75*l.* 15*s.*, with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63*l.* 3*s.* 7*d.*, and there was a further charge of 1*l.* 6*s.* for expenses of collection. The average annual expenses of repairs, which were done by the landlords, and which the revising barrister found were necessary to enable them to obtain the net rent of 63*l.* 3*s.* 7*d.*, had for the preceding six years been 4*l.* per annum. The revising-barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was of less than the value of 40*s.* by the year, and he expunged his name from the list:—Held, that he had correctly decided.

WILLIAM BASS, whose name was on the register of voters for the

county of Cumberland, duly objected to the name of John Hamilton being retained on the list for the town of Caldengate.

John Hamilton was registered to vote in respect of one undivided thirtieth part of freehold dwelling-house, dwelling-rooms, bake-house, school-rooms, and reading-room, Church Street and Bread Street. The facts of the case were as follows:—

In 1846, a conveyance of the property in question was duly executed to the use of the voter and twenty-nine others, in fee. The purchase-money was advanced, in equal portions, by each of the thirty persons in whose favour the conveyance was made. Immediately after the purchase, the property was let on behalf of the purchasers at a gross rent of 75*l.* 15*s.*, with an agreement that the landlords should pay all rates and taxes.

The tenants were rated to all the usual tenants' rates; which were, in this case, the poor-rate and other parochial rates, amounting to 10*l.* 10*s.* 10*d.*, and a lighting-rate, and rate called "the board of health rate," amounting together to 2*l.* 0*s.* 8*d.* in the year. But all these rates, in pursuance of the terms of the letting, were paid by the landlords.

But for the agreement, these rates would all have been \*payable by the tenants, and the rental of the property would have [\*632 been diminished by the amount of the rates.

Besides these rates, there had been an expenditure on behalf of the landlords in each year, in order to keep the premises in sufficient repair. This expenditure had been in the last year so large as to reduce the resulting share of each landlord to less than 40*s.*; but, in other years, it has been small enough to leave the return to each landlord higher than 40*s.* The average expenditure for repairs upon the six years from 1846, had been 4*l.* in the year. Such a sum by the year, upon an average, was necessary to be expended in repairs by the landlords, in order to enable them to procure the rent of 75*l.* 15*s.*

There was a further annual expense to the landlords for collecting rents, and which was a necessary expense, of 1*l.* 6*s.* A manager had been appointed on behalf of the landlords, who had in each year collected the rents, paid the expenses, kept the accounts, divided the profits, and transmitted to each landlord his resulting share.

Upon this state of facts, it was agreed, on both sides, that the annual rent which a solvent tenant would give for the property in its then condition, must, in this case, be taken to be 63*l.* 3*s.* 7*d.*; and that the sum of 1*l.* 6*s.* was a charge payable by the landlords in respect of the property, which ought to be deducted. But it was contended on behalf of the voter, that the sum of 4*l.*, being the average expenditure for necessary repairs as aforesaid, ought not to be treated as a charge payable by the owners in respect of the property, and that it ought to be deducted: whilst it was contended, on behalf of the objector, that



the average expenditure of 4*l.* for necessary repairs, was a charge payable by the owners in respect of the property which ought to be deducted.

\*633] The revising-barrister held that the true measure of \*the annual value of the property in this case, was, the gross rent, less the annual tenant's rates mentioned, and that the annual charge for collection was a charge which ought to be deducted: and he further held that the annual average expense for necessary repairs was also a charge payable by the owners in respect of the property, which ought to be deducted, in order to determine the annual value of the property to the owners. If the sum of 4*l.* was deducted, the resulting share to each owner was less than 40*s.* by the year: if it was not, the share to each owner was more than 40*s.* The revising-barrister held that the share of each owner was of less value than 40*s.*; and he expunged the name of the voter from the list.

The cases of the twenty-nine other owners were consolidated with the principal case.

*Mellor*, for the appellant.—The question is, whether the cost of repairs is to be taken into account in ascertaining the value of the voter's interest in this land. The statute 8 H. 6, c. 7, gives the right of voting to those who have "free land or tenement to the value of 40*s.* by the year at the least above all charges." The 10 H. 6, c. 2, professes to explain that, by ordaining "that the knights of all counties within the realm of England, to be chosen to come to parliaments thereafter to be holden, shall be chosen in every county by people dwelling and resiant in the same, whereof every man shall have freehold to the value of 40*s.* by the year at the least, above all charges, within the same county where any such chooser will meddle of any such election." The 5th section of the 18 G. 2, c. 18, defines the meaning of "charges:" it enacts that "no person shall vote in any such election, without having a freehold estate in the county for which he votes, of the clear yearly value of 40*s.*, over and above all rents and charges payable out of

\*634] "or in respect of the same." [MAULE, J.—Repairs are not "charges:" but the property which gives the right of voting must be of the clear yearly *value* of 40*s.* If a man has a piece of land by means of which he can enable himself to expend 40*s.* a year, by laying out 5*s.* upon it, can that be said to be of the *value* of 40*s.* by the year? JERVIS, C. J.—This question arose in *Lee*, app., *Hutchinson*, resp., 8 C. B. 16 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 159. There, A., possessed of a freehold estate of the yearly value of 5*l.*, mortgaged it for 100*l.*: the deed was declared to be a security for the principal sum only; and the power of sale was for payment of that sum only, at a day long past: but it was found as a fact that interest had been regularly paid upon the 100*l.* at 5 per cent.: and it was held that A. had not an interest in land "to the value of 40*s.* by the year at

the least above all charges," within the 8 H. 6, c. 7, and therefore was not entitled to be registered for the county.] It was not the policy of the statute to create subtle distinctions. Is a man who lays out nothing in repairs to be put in a better position than one who does? In *Colville, app., Wood, resp.*, 2 C. B. 210 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 488, it was held that the proper criterion of "clear yearly value," within the 2 W. 4, c. 45, s. 27, is, the fair annual *rent*, without making any deduction on account of repairs or insurance. [MAULE, J.—Can a man be said to possess land of the clear yearly *value* of 40*s.*, if it is necessary to expend 5*s.* a year to enable him to obtain that sum for it?]  
The words are, not "net annual value," as in the 6 & 7 W. 4, c. 96, s. 1, but "clear yearly value of 40*s.* over and above all rents and charges." In *The King v. Framlingham, Burr. Sett. Cas.* 748, the pauper hired a tenement at the yearly rent of 10*l.*, all parish rates and charges to be paid by the landlord; and the question was, whether that was a hiring of a tenement within the 9 & 10 W. 3, c. 11. The court said: "This was a \*good taking a lease of a tenement of the [\*635 yearly value of 10*l.*, within the intention and meaning of the act of parliament. It turns upon the credit given to the certificate-person. Now, here, credit is given to this man for 10*l.* a year. He contracted for it at that rent; and he paid that rent to his landlord for it. It was a real and bonâ fide taking of a tenement of that yearly value." [JERVIS, C. J.—In *The King v. Tomlinson*, 9 B. & C. 168 (E. C. L. R. vol. 17), 4 M. & R. 169, cited in *Colvill, app., Wood, resp., Bayley, J.*, says,—“In the case of houses, the annual *profit* or *value* is always a part only of the annual rent paid to the landlord. Some portion of that rent ought to be set apart to form a fund for repairing or building, when necessary: in other words, to maintain or re-produce the subject of occupation.” MAULE, J.—Parke, J., says the same, in substance, in *The King v. Lord Granville*, 9 B. & C. 188, 4 M. & R. 171.] It may be right that the cost of repairs should be deducted, where the object is to ascertain the rateable value of property; but not where the annual value to the owner is in question. [JERVIS, C. J.—The case of *Colvill, app., Wood, resp.*, is not at all applicable to this matter. There, the question was, whether the tenant had that which was worth 10*l.* a year to him. The circumstance of his landlord being obliged to expend a portion of the rent in repairs, did not make the house of less value to the tenant. Here, however, the rent received by these thirty persons, is, 68*l.* 3*s.* 7*d.* per annum, minus 4*l.* a year, which is necessarily expended in repairs, in order to realize that sum.] The words "yearly value" are used by the legislature in different senses for different purposes. Where the object is to confer a qualification, the construction should, it is submitted, be most liberal.

*S. Temple*, for the respondent.—The case of *Colvill, app., Wood,*

\*636] resp., has been disposed of by the \*observation last made upon it. [MAULE, J.—The reprises there increased the value of the premises to the voter: here, they diminish it. The qualification required by the 8 H. 6, c. 7, has never been altered by any subsequent statute: the 18 G. 2, c. 18, s. 5, merely explains what shall be considered “charges.” The decision here depends, not on “charges,” but on “value.” [MAULE, J.—The Legislature do not contemplate specially land being let at a rent. Suppose a man occupies a piece of land, in respect of which he claims to vote because the corn he raises upon it is worth 50s.,—would not the answer be, “True; your corn fetches 50s., but it costs you 30s. to produce it?” He would not have 40s. by the year to expend. Manure is very analogous to “reprises.”] The principle upon which this decision must depend seems to have been settled in three cases in this court, viz. Copland, app., Bartlett, resp., 6 C. B. 18 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 102, Lee, app., Hutchinson, resp., 8 C. B. 16 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 160, and Beamish, app., The Overseers of Stoke, resp., 11 C. B. 29 (E. C. L. R. vol. 78), 2 Lutw. Reg. Cas. 189. In the last-mentioned case, an allottee of three shares in a building society, in October, 1850, purchased freehold land of the value of 6*l.* per annum. The amount of the purchase-money and expenses (84*l.* 14*s.*) was advanced to him by the society upon mortgage of the land so purchased. By the rules of the society, each member was required to pay 1*s.* 6*d.* weekly for each share, and to execute to the trustees a mortgage to secure to them the sum in which the member might be indebted to the society, “with a premium for prior advance equal to 5*l.* per cent. per annum upon the amount advanced, until repaid, and such sum, not exceeding 2*s.* 6*d.* per share per annum, for incidental expenses, as the committee should think fit,”—such mortgage reserving to the trustees a power of sale, in case

\*637] the member should fail for twenty-six weekly \*meetings to pay, observe, and perform all or any of the subscriptions, payments, covenants, agreements, and regulations on his part to be paid, observed, &c. No default had been made in the payment of the contributions required by the rules; and the mortgagee had always been, and still remained, in actual possession of the property. The amount of principal money due to the society on the 30th of January, 1851, was 47*l.* 10*s.* 3*d.* The weekly contributions of 1*s.* 6*d.* per share (amounting to 11*l.* 14*s.* per annum) were appropriated by the society thus,—8*l.* 18*s.* in part liquidation of the principal mortgage debt, 2*l.* 10*s.* for premium or interest, and 6*s.* for incidental expenses. It was held, that these contributions constituted a “charge” upon the land, within the meaning of the statute 8 H. 6, c. 7, and consequently that the mortgagor was not possessed of an estate “of the clear yearly value of 40*s.* at the least, above all charges.”

*Mellor*, in reply.—In *The King v. Ringwood*, 1 M. & Selw. 881, the

renting an acre of land at 8*l.* from Easter to October, for planting potatoes, where the land had been previously dug by the landlord for that purpose, and would not have been let for more than half that price if it had not been dug, was considered as a tenement of the yearly value of 8*l.*, although the case stated, that, in a common way, an acre of such land would not let for more than 2*l.* If the cost of repairs is to be deducted, it will always be necessary to go into an inquiry as to the outgoings in that respect in each year. [MAULE, J.—The rent is only an ingredient in ascertaining the value. The revising-barrister may take into consideration what is necessarily spent by the landlord in order to enable him to get what he does.] The case does not find the value of the land as a fact.

\*JERVIS, C. J.—It seems to me that the decision of the revising-barrister is in substance correct, though, if we were bound [\*638 to affirm it for the reasons he gives, we possibly might hesitate. The real question to be decided is not as to the meaning of the word “charge,” in the 8 H. 6, c. 7; for, I do not think a mere voluntary payment can be said to be a “charge.” But the other point arises, which was decided in the case of *Lee, app., Hutchinson, resp.* The question is, what is the property worth? And the proper way to try that, is, to ascertain what a tenant would give if he himself expended 4*l.* a year in repairs. The revising-barrister finds, that, if the sum expended for necessary repairs to enable the owners to obtain the rent of 63*l.* 3*s.* 7*d.* be deducted, the share of each is of less than the value of 40*s.* per annum. The question whether or not the premises are of the yearly value of 40*s.*, is in each case a question of fact, to be determined by all the surrounding circumstances. Here, the barrister has found the fact, and, I think, correctly; and therefore his decision must be affirmed.

MAULE, J.—I concur with the Lord Chief Justice in thinking that the decision of the revising-barrister in this case should be affirmed, for the reasons I gave in the course of the argument.

TALFOURD, J., concurred.

Decision affirmed, with costs.

\*Borough of TEWKESBURY.

[\*639

JOHN COLLINS, Appellant; JOSHUA THOMAS, Town Clerk  
of Tewkesbury, Respondent. Nov. 12.

A party who occupies a house, and a garden not immediately adjoining the house, but both occupied by him as tenant under the same landlord, and at one entire rent exceeding 10*l.* per annum, is entitled, under the 2 W. 4, c. 45, s. 27, to be registered in respect thereof.

JOHN COLLINS objected to the name of James Beesley being retained on the list of persons entitled to vote for the borough of Tewkesbury,

in respect of the occupation of premises described in the list as "house and garden," on the ground that the garden was separate and apart from the house.

The party objected to occupies a house in Chance Steet, within the borough of Tewkesbury. He is also tenant, under the same landlord, of a piece of garden-ground (also within the borough of Tewkesbury), which is not immediately adjoining the house; but the house and the piece of garden-ground were both taken of the same landlord, at the same time, and at one entire rent.

The garden-ground is at the back of the voter's house, and not more than forty yards distant from it in a direct line: but, between the house and the garden-ground there is some waste-land, and a row of buildings; and, to get to the garden-ground, the voter must go out of his front door, into Chance Street, and along the public road for not more than sixty yards, then turn to the right, and go along another public road for not more than forty yards, to the gate leading into the garden-ground.

The garden-ground is allotted amongst the tenants of the houses in Chance Street, each tenant having a separate allotment, which is included in and forms part of his tenancy. The house and the piece \*640] of garden-ground let with it, are together worth more than 10*l*. \*per annum; but the house alone is not of the annual value of 10*l*.

The revising-barrister decided that James Beesley occupied a house and land of sufficient value to entitle him to have his name retained on the list of voters for the said borough, within the meaning of the statute 2 W. 4, c. 45, s. 27; and he retained his name accordingly.

If the court should be of a contrary opinion, the name of the said James Beesley is to be expunged from the said list of voters; and also the names of nine other persons, objected to under similar circumstances, and whose appeals were consolidated herewith.

*Malcolm Kerr*, for the appellant.—The question arises upon the 27th section of the 2 W. 4, c. 45, which confers the right of voting upon one who shall occupy within the borough, as tenant, "any house, &c., being, either separately or jointly with any land within such borough, occupied *therewith* by him as tenant under the same landlord, of the clear yearly value of not less than 10*l*." It has never been expressly decided whether or not, under this section, the land must be contiguous or immediately adjoining the house: but a suggestion is thrown out by the court, in *Capell, app., The Overseers of Aston, resp.*, 8 C. B. 1 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 143, that the word "*therewith*" rather imports local contiguity. If that word means anything else, it clearly is unnecessary: and the court will hardly assume that it was inserted for no purpose. [MAULE, J.—You assume that it means "under the same demise." That, however, is not so in terms.

Suppose a man hires a house on one day, and next day a garden contiguous thereto, both from the same landlord, and together worth 10*l.* a year, though separately of less value,—would he not be qualified?] That would not satisfy the condition as to time. [MAULE, J.—Why not, from \*the latter day? JERVIS, C. J.—May you not read the section thus,—shall occupy the land “there,” within the [\*641 ambit of the borough, and “with” the house? Does not that give the whole a sensible construction?] It has already been decided that a house and a workshop at a distance from it, though occupied at the same time, and under the same landlord, cannot be joined so as to make up a qualification: Powell, app., Price, resp., 4 C. B. 105 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 586. A devise of “my messuage in Chance Street,” would not carry a garden two streets off. In Rogers on Elections, 7th edit. p. 173, it is said: “The words ‘occupied therewith’ have occasioned a question whether ‘therewith’ only has reference to time, or whether it is necessary that the house, &c., and land should have been jointly demised, or that at least they should in some way be attached to or connected with each other. The latter view seems to embrace various subtleties; and, indeed, the provision that both should be held under the same landlord would hardly have been necessary, if this latter construction had been in contemplation.” [MAULE, J.—A man may have a qualification consisting of a counting-house five stories high, and a garden in another part of the borough, if both are held under the same landlord. The words of the act are very plain.]

*Pashley*, for the respondent, was not called upon.

PER CURIAM.—There can be no doubt in this case. The decision of the revising-barrister is right, and must be affirmed.

Decision affirmed, with costs.

\*WILTSHIRE—Southern Division.

[\*642

JOHN LAMBERT, Appellant; The Overseers of ST. THOMAS,  
NEW SARUM, Respondents. Nov. 12.

A notice of objection to a county voter, under the 6 & 7 Vict. c. 18, s. 7, in the following form,  
—“Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts.”—Held, a sufficient compliance with Sched. A. No. 5, there being no other list to which the notice could apply than the list of county voters.

JOHN ALFORD LUSH objected to the name of John Lambert, the appellant, being retained on the St. Thomas, New Sarum, list of votes for the southern division of the county of Wilts. The facts of the case were as follows:—

The said John Alford Lush had duly served the appellant with a notice of objection, of which the following is a copy :—

“To Mr. John Lambert, of the parish of Milford, in the county of Wilts.

“Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts. Dated, this 24th day of August, 1852.

(Signed) “JOHN ALFORD LUSH, of New Street, in the parish of St. Thomas, New Sarum, on the register of voters for the parish of St. Thomas, New Sarum.”

The appellant objected to the validity of this notice, because it was not according to the form numbered 5 in the schedule A. annexed to the 6 & 7 Vict. c. 18, or to the like effect.

The revising-barrister held the notice to be valid; and, upon the appellant's declining to prove his qualification, he expunged his name from the St. Thomas, New Sarum, list of voters.

If the court should reverse his decision, the St. \*Thomas, \*643] New Sarum, list was to be amended by restoring the name of John Lambert, thus :—“Lambert, John; Milford, Wilts; two freehold houses, High Street.”

There were similar objections to seven other voters, whose appeals were consolidated with the above.

Warren, for the appellant.—The 7th section of the 6 & 7 Vict. c. 18, requires the notice of objection served upon the party objected to, to be according to the form numbered 5 in schedule A., or to the like effect. The notice in question, it is submitted, is not a due compliance with that direction, inasmuch as it is ambiguous, and leaves the party in doubt as to whether it points at his borough or his county vote. There is in fact no such list as “the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts.” [JERVIS, C. J.—Then, the party could not have been misled by the notice. He is to look at the substance of the thing. Eaden, app., Cooper, resp., 11 C. B. 18 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 183.] This notice clearly is not in the form required by the act. Neither is it “to the like effect.” It might have been given in respect of his borough vote. He might have come prepared to defend his borough vote, and then the objector might have turned round and attacked his county vote. [JERVIS, C. J.—The case does not state that the party has a vote for the borough.] If the fact be material, the court will probably send the case back to be amended in this respect. In Allen, app., House, resp., 7 M. & G. 157 (E. C. L. R. vol. 49), 8 Scott, N. R. 987, 1 Lutw. Reg. Cas. 255, in a borough where two lists are made out by the overseers, —one of the parties entitled to be registered under the 2 W. 4, c. 45, s. 27, the other, of potwallers, a notice of objection to the name of a party being retained “on the list of persons entitled to vote as house-

*holders* in the election," &c., was held sufficient, though the words "as \*householders" do not occur in the form given by the statute 6 [\*644 & 7 Vict. c. 18; it not appearing that the party could have been inconvenienced or misled by the introduction of those words. But Tindal, C. J., said, that, "if the insertion of those words could by possibility have misled the party objected to, then the notice, not being in strict compliance with the form given in the act, would have been bad." In *Eidsforth*, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517, in a notice of objection under the 17th section of the 6 & 7 Vict. c. 18, the objector was described as "R. F., of, &c., on the list of voters for the borough of L.;" the register of voters for the borough of L. consisted of four separate lists, viz. one of 101. householders for each of three townships comprised in it, and one of the freemen of the borough: the objector's name was on the last-mentioned list only: and it was held, that he was insufficiently described in the notice, and that the inaccuracy of description was not cured by the 101st section. So, in *Woollett*, app., Davis, resp., 4 C. B. 115 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 607, in a notice of objection, the place of abode of the objector was described as "The Oaks" (without the addition of any parish, township, or other district), "on the register of voters for the parish of St. W.:" in the list of voters for the parish of St. W., the objector's place of abode was described as "St. W.," and his qualifying property as "The Oaks;" and it was held that the description was insufficient, and could not be aided by a reference to the list of voters, so as to show that the place called "The Oaks" was in the parish of St. W.; and that the objection was not removed by the finding of the revising-barrister that the place referred to was in fact in the parish of St. W. Wilde, C. J., in delivering the judgment of the Court, said:—"We are of opinion that no notice can be deemed to be in the form or to the effect required by the statute, which does not in itself embrace \*a sufficient statement of the place of [\*645 abode. We think it is contrary to the meaning and intent of the legislature, that the party receiving the notice should be compelled to take trouble, and to resort to other sources than the notice itself, in order to obtain the necessary information as to such place of abode."

[TALFOURD, J.—In the two last-mentioned cases the inaccuracy was in the description of the *objector*; the notice did not show with sufficient certainty that he was a person entitled to object.] They show how important the court considered it to hold these notices to a strict compliance with the act. In *The Queen v. The Mayor and Assessors of Harwich*, 16 Jurist, 995, a notice of objection served upon a burgess, to his name being retained on the list of burgesses, in the following form,—“I hereby give you notice that I object to *your name* being retained,” &c., was held by Crompton, J., to be no compliance with the 5 & 6 W. 4, c. 76, s. 17, and the form in sched. D. No. 8, because it



did not contain "*the description of the person objected to, as described in the burgess-list.*"(a)

JERVIS, C. J.—It seems to me that the revising-barrister has decided correctly, and that the voter was bound to prove his qualification. The 7th section of the 6 & 7 Vict. c. 18, does not say that the notice of objection shall be in any precise form, but that it shall be "according to the form numbered 5 in schedule A., *or to the like effect.*" Here, the notice, instead of saying "in the St. Thomas, New Sarum, list of \*646] voters for the southern division of the \*county of Wilts," says, "in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts." That is in substance the same thing. Is it not expressly within the provision in the 101st section, "that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in any wise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood?" Could this person do otherwise than understand from the notice here given, that it pointed at the list of voters for that division of the county where his vote was? It was a question for the revising-barrister whether or not the notice was such as could possibly mislead. He has decided, and I think correctly, that it was not.

MAULE, J.—I also think this is a notice to the like effect with that which is given in the schedule to the act. But, if there were any doubt about that, I think we should be stripping the provision in the 101st section of all practical effect, if we were to hold it not to be applicable to such a case. What is the notice required by the act? It is,—"*Take notice, that I object to your name being retained in the [here insert the name of the parish] list of voters for the county of ——— [or, for the ——— riding, &c.]*" What is the notice given? It is,—"*Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts.*" Can you give any effect at all to this notice, without understanding it to say that the vote which is objected to is in the \*647] county list? There is no other list \*to which the description *could* apply. This is precisely one of the cases the 101st section was designed to meet.

TALFOURD, J., concurred.

Decision affirmed, with costs.

(a) But see *The Queen v. The Mayor and Assessors of Harwich*, 17 Jurist, 914, where a similar notice was held by the full court to be sufficient, inasmuch as it satisfied the words "*or to the like effect,*" in s. 17; Lord Campbell saying,—"*This notice gives all the information which the legislature intended to be given by the form No. 3, Sched. D., and is therefore 'to the like effect.'*"

## LEICESTERSHIRE.—Southern Division.

RICHARD BEESON, Appellant; JOHN BURTON, Respondent.  
Nov. 17.

By a local act, 8 & 9 Vict. c. 6, the resident freemen of a borough were empowered to elect from their body a certain number of deputies to act for them in the management of "the freemen's allotments;" and the 8th section of the act empowered the deputies to divide certain of the lands into small allotments among the resident freemen desiring to become occupiers thereof, at a small annual rent,—*"the allotments to be held respectively by each resident freeman desiring to become the occupier obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies."* By subsequent sections, the lands in question were vested absolutely in the deputies for the time being, in trust for the resident freemen, with power to sell the same, with the consent of the major part of the freemen assembled at a meeting convened for that purpose; and a power of re-entry was reserved to the deputies, in case any freeman should be in arrear of rent for his allotment for fourteen days, or should fail to conform to the provisions of the act, or the rules to be made by the deputies:—

Held, that each allottee had a freehold estate "of an uncertain duration," in his allotment, which entitled him to vote in the election of members for the borough.

THE names of John Burton and twenty-eight other persons claiming under similar circumstances, appeared on the list of persons claiming to be entitled to vote in the election of any knight of the shire for the southern division of the county of Leicester, and were all duly objected to by the appellant.

The said John Burton appeared on the list of claimants, as follows:—

Name of voter.	Place of abode.	Nature of qualification.	Street, &c., where the property is situate, &c.
Burton, John,	3, Haymarket.	Freehold interest in building and land.	Onaroad, T. Freeman's Common.

John Burton is a resident freeman of the borough of Leicester, and possessed of an allotment of land under \*the provisions of a private act of parliament, 8 & 9 Vict. c. 6, intituled "An act to [\*648 repeal so much of an act for enclosing lands in or near the borough of Leicester, as relates to the regulation and management of the freemen's allotments, and to make other provisions in lieu thereof." By this act, which was annexed to and formed part of the case, the resident freemen are empowered to elect from their own body a certain number of deputies to act for them in the regulation and general management of the freemen's allotments.

The 8th section empowers the deputies to take possession of the lands comprised in the first schedule of the act (of which lands the allotment of the present claimant forms a part), and break up the whole or such parts thereof as to them shall seem expedient, and apportion and divide the same when so broken up into small allotments,

not exceeding five hundred yards each, among the resident freemen desiring to become occupiers thereof, at an annual rent to be fixed at the discretion of the deputies, but not exceeding one farthing for every square yard, nor less than one shilling for every hundred yards; the allotments to be held respectively by each resident freeman desiring to become the occupier, and obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies.

By the 15th section, all the lands comprised in the two schedules of the act, are vested absolutely in the deputies for the time being, in trust for the resident freemen.

By the 17th section, the deputies have power to dispose, by absolute sale, of all or any part of the allotment comprised in the first schedule of the act, freed and discharged from all right, claim, and interest of \*649] the resident freemen, but, by the 22d section, no sale is to be \*effected under the powers of the act, without the consent of the major part of the freemen assembled at a public meeting, to be convened and conducted in the manner directed by this section.

By the 32d section, in case any freeman shall be in arrear of rent for his allotment, for the space of fourteen days, or shall not conform to the provisions of the act, or the orders, rules, and regulations to be made by the deputies, the said deputies may re-enter such allotment, and by force evict and dispossess such freeman.

The claimant has erected buildings on the land allotted to him, which land and buildings are above the value of 40s. above all charges.

It was contended, on the part of the appellant, that the claimant had no freehold interest in his allotment: but the revising-barrister decided that he had, and inserted his name accordingly on the list of voters for the parish of St. Mary, Leicester.

The cases of Thomas Archer, and twenty-seven other persons whose claims depended on the same point, were consolidated with the principal case.

*W. E. Cox*, for the appellant.—By an act of 44 G. 3, c. 16, certain commonable lands of the borough of Leicester were authorized to be allotted to the resident freemen and widows of freemen. By a subsequent act, of 8 & 9 Vict. c. 6 (private), passed for the purpose of repealing the former act, and reciting, amongst other things, an indenture of the 4th of February, 1842, made between the mayor, aldermen, and burgesses of Leicester, of the first part, and certain persons therein described as being deputies duly appointed under the 44 G. 3, c. 16, to act on behalf of the freemen of the borough of Leicester, resident within the town and borough, or the precincts or liberties thereof, and the widows of freemen of the said borough during their widowhood, and

being \*resident as aforesaid, of the second part, whereby certain land in Leicester was conveyed to the parties of the second part, [\*650 upon certain trusts; and further reciting, that "the resident freemen and freemen's widows of the said borough of Leicester have considerably increased in numbers since the passing of the 44 G. 3, c. 16, and the majority of them are poor persons, and have no commonable cattle to depasture on the said allotments, closes, or pieces of land, and therefore can derive no benefit or advantage therefrom in the way the same are now used, occupied, and enjoyed; and that it would be of much greater and more general benefit and advantage to the larger portion of the said resident freemen and freemen's widows entitled to such common of pasture in or over the said allotments, closes, and lands, as aforesaid, and especially to the poorer classes thereof, if certain parts of the same allotments, closes, and lands were broken up and parcelled out into small allotments, for the purpose of being let to, and occupied as garden-ground by, such of the said resident freemen and freemen's widows not exercising such common of pasture, as may be desirous to take and occupy the same, at a small rent, and otherwise, as hereinafter mentioned, and if the said deputies for the time being were empowered to sell such allotments, closes, and lands, or part thereof, and to purchase other lands with the moneys arising therefrom, and also with the moneys now in their hands, and which are now or may hereafter come under their management and control, and also to build and endow cottages for the use and benefit of the most aged of the resident freemen and freemen's widows of the said borough, as hereinafter mentioned,"—the 44 G. 3, c. 16, was in part repealed. By s. 8, the deputies were empowered to appoint and divide the land in question "into small allotments or parcels not exceeding five hundred yards square each, and to make all such fences, roads, and \*ways as they may deem necessary or expedient, such allot- [\*651 ments or parcels to be made or set out in such sizes or quantities, to such an extent, and in such manner, as that every resident freeman and freeman's widow (not exercising common of pasture as hereinafter mentioned) who shall, within the period of two calendar months next after the passing of this act, send in or deliver to the deputies for the time being, or to their clerk, a notice or claim in writing, requiring or asking for one of such allotments or parcels, and desiring to become the occupier thereof, shall and may have and be entitled to the same, of such size or extent, at such yearly rent, in such situation, and upon such terms and conditions, as the said deputies shall in their discretion think fit and determine, but so that no such allotment shall contain a greater quantity than five hundred yards square; and every such allotment or parcel shall be let at an annual rent, to be fixed at the discretion of the said deputies, but not exceeding one farthing for every square yard, nor less than one shilling for every one hundred square yards; and the same allotments or parcels shall be respectively held by each resident freeman

*and freeman's widow so desiring to become the occupier, and obtaining possession thereof, so long as he or she shall be willing to hold the same, and shall pay the annual rent to be fixed or reserved for the same, and shall conform to and observe the orders, rules, and regulations from time to time to be made concerning the same by the said deputies."* By s. 15, the lands were "absolutely vested in the deputies for the time being appointed in pursuance of the directions of this act, and their successors, for ever, in trust for the said resident freemen and freemen's widows of the said borough, according to and under and subject to the powers and authorities, rules and regulations in this act contained or authorized to be made: and the said deputies and their successors shall \*652] and may, and they are \*hereby empowered to accept, take, and hold, in the nature of a body corporate, for the purposes of this act, all such closes, lands, and hereditaments, so hereby vested in them as aforesaid." By s. 16, the deputies were empowered to purchase other lands, to be conveyed to and vested in them subject to the provisions of this act. By s. 17, they were empowered, "when and so often as may be thought expedient, to dispose of and convey, by way of absolute sale, all or any part or parts of the said allotments, lands, and hereditaments comprised or specified in the first schedule to this act (the lands now in question), and also any part or parts of the lands, tenements, or hereditaments which shall or may be purchased in pursuance of the power or direction for that purpose hereinbefore (s. 16) contained, with their respective appurtenances, and the inheritance thereof, in fee-simple (freed and discharged from all right, claim, and interest whatsoever of the said resident freemen and freemen's widows for the time being, and of every person and persons claiming under or in trust for them), unto any person or persons whomsoever, for such price or prices in money as to them the said deputies shall seem reasonable or competent in that behalf,—subject, nevertheless, to such consent as hereinafter mentioned." By s. 22, it is provided that no such sale shall be made "without the previous consent of the major part of the said freemen and freemen's widows resident as aforesaid, and to be present and assembled at a public meeting to be called for that purpose," by advertisement in the local papers. Section 23 provides for the application of the moneys received. Section 24 directs the appropriation of a portion of the fund to the building and endowment of cottages, under certain regulations. Section 25 provides for the occupation of such cottages: "Provided always, that every resident freeman or freeman's widow who shall obtain any such cottage as aforesaid, shall be \*653] \*entitled to keep and retain possession thereof rent-free, and to receive such weekly allowance as aforesaid (s. 24), during such time and so long only as he or she shall actually and bonâ fide live and reside therein, and shall not underlet or otherwise part with the same, or the use or possession thereof, or of any part thereof, to any other

person or persons whomsoever; and, in case any such freeman or freeman's widow shall underlet or otherwise part with the possession of any such cottage as shall be so let to him or her, or shall cease to live and reside therein, or shall not conform to the rules and regulations to be from time to time made by the said deputies for the well government and good conduct of the inmates of such cottages, or in case any inmate shall, in the opinion of the said deputies, be guilty of any gross misconduct or disobedience to the said rules, then and in every or any of such cases it shall be lawful for the deputies for the time being, or for any person or persons for that purpose to be duly authorized by them at any meeting to be held under or by virtue of the provisions of this act, after having given to such inmate, or left at the cottage then or then lately occupied by him or her, a notice in writing, signed by the chairman of the said deputies, or by any two of the deputies for the time being, demanding possession thereof, and default shall be made by such inmate in giving up such possession for the space of fourteen days next after such notice shall have been so given or left as aforesaid, to enter into and take possession of the cottage then occupied or then lately occupied by any such freeman or freeman's widow who shall so underlet or cease to reside, or shall not conform, or who shall be guilty of any such misconduct or disobedience as aforesaid, and by force to expel and dispossess such freeman or freeman's widow, and every or any other occupant or occupants, and his, her, or their goods and chattels therefrom, and thenceforth to \*withdraw and stop the weekly allowance which was previously payable to such freeman or free-

[\*654 man's widow as tenant of such cottage, but subject, nevertheless, as to the whole of the matters lastly hereinbefore contained, to an appeal to the justices of the peace for the said borough of Leicester as hereinafter (s. 46) mentioned and provided for." Section 28 empowers the deputies "from time to time to make any such orders, rules, and regulations, subject to the provisions of this act, as to them shall seem fit and expedient, for the well government and good conduct of the inmates and occupiers of the said cottages, and for the division, enclosure, allotment, and general management of the said lands hereby authorized or directed to be allotted or enclosed in small parcels as aforesaid, and for the mode and manner of holding and letting the same, and the rents to be paid for the same," &c. And section 32 gives the deputies, in addition to the usual powers of landlords, the like powers for recovering rents of allotments as overseers have for the recovery of the poor-rates; and enacts, that, "in case any such freeman or freeman's widow shall at any time be in arrear for the payment of his or her rent for the allotment or enclosure to be let to him or her as aforesaid, or any part thereof, for the space of fourteen days next after the same shall become due, or shall not conform to the provisions of this act, or to the orders, rules, and regulations to be made by the said deputies rela

tive thereto, as hereinbefore mentioned, then and in either of such cases it shall be lawful for the said deputies or their officers, or others to be thereunto authorized by them, or any three or more of them, to re-enter into every such allotment or enclosure, and by force to evict and dispossess such freeman or freeman's widow, and every other person or persons, therefrom, upon such notice, and in such way and manner, and subject to such appeal as hereinbefore (s. 25) and \*655] hereinafter (s. 46) mentioned \*with respect to the said cottages."

The revising-barrister rested his decision in this case upon the principles laid down in the cases of Davis, app., Waddington, resp., 7 M. & G. 37 (E. C. L. R. vol. 49), 8 Scott N. R. 807, 1 Lutw. Reg. Cas. 159, Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168, and Ashmore, app., Lees, resp, 2 C. B. 31 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 337. In the former of these cases, the trustees of an almshouse were empowered by letters-patent of incorporation to appoint and remove twenty-four inmates, "*toties quoties sibi conveniens fore videbitur*:" and it was held that, the inmates appointed under this power, did not take an estate for life in the property enjoyed by them as such inmates, and were therefore not entitled to be registered as freeholders. The ground of the decision there was, that the trustees had power to remove the inmates at their pleasure. [JERVIS, C. J.—Here, the freemen are to hold so long as they please, provided they pay the rent, and conform to the regulations: the deputies have no power to turn them out, unless they, by the majority, are consenting parties.] The whole scope of the act is inconsistent with their taking a freehold interest. [MAULE, J.—What interest do you say they took?] A tenancy at will. [MAULE, J.—At whose will?] The will of the deputies, with the consent of the majority of the freemen,—and that notwithstanding the tenants might have observed all the conditions of their holding. It is of the very essence of a freehold, that it should be held without being subject to the will of anybody. [MAULE, J., referred to Co. Litt. 42 a, where it is said, that, "if a man grant an estate to a woman *dum sola fuerit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during coverture, or as long as the grantee dwell in such a house, or as long as he pay 10*l.*, &c., or until the grantee be promoted to a \*656] benefice, or for any like uncertain time, which time, as Bracton saith, \**is tempus indeterminatum*: in all those cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and, if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude that, by force thereof, he was seised generally for term of his life."] In Simpson, app., Wilkinson, resp., the bedesmen were not removable at pleasure, and therefore were held to have a free-

hold. In *Ashmore, app., Lees, resp.*, as in *Davis, app., Waddington, resp.*, the inmates of the hospital were held not entitled to such an estate as to give them a vote.

*G. Hayes*, for the respondent.—The nature and quality of the interest these claimants have, depends upon the act of parliament. The various sections which have been referred to show that their estate is not determinable at the mere will of the delegates, who may be called the grantors: and the 11th section obviously contemplates the death of the occupier as the ordinary determination of his estate. The decision in *Davis, app., Waddington, resp.*, proceeded upon the ground that the party granting the estate had an arbitrary power of determining it, and therefore the grantee had no freehold. [MAULE, J.—The inmate's right to stay in the alms-house was dependent on the will of the persons who placed him there.] The authorities upon this subject are all collected in Serjeant Manning's note to *Wynne v. Wynne*, 2 M. & G. 19 (a) (E. C. L. R. vol. 40), where it is said that "any interest in land of an uncertain duration (though not expressed to be for life), determinable by matter subsequent, which (per Brooke, J., M. 14 H. 8, fo. 13 a) is the subject of human agency (as, where it is determinable at the will of a stranger), constitutes a freehold for life:" for which the learned Serjeant cites a great number \*of authorities, beginning with Bracton, lib. iv. tract i. c. 28, fo. 207 a, and ending with Preston on Estates, [\*657 405. Appended to the case of *Davis, app., Waddington, resp.*, is a very learned note by the same author,—7 M. & G. 45–49 (E. C. L. R. vol. 49),—the general scope of which is, to show that the court rather strained the law in the principal case. The result of the authorities referred to in that note, is, that, where the interest is determinable at the will of the grantor, it is a mere estate at will; but where it is made to depend upon the will of the grantee, or the uncertain act of a stranger, the law considers it as an estate for life. That is in conformity with the rule laid down in Co. Litt. 42 a. And see 1 Cruise Dig. 102. Here, there is an uncertain event which may put an end to the estate, viz. a sale of the land; but the 22d section of the act expressly provides that that shall only take place with the consent of the majority of the resident freemen,—which practically is, with the consent of the occupier himself: and that is no more than a condition which is annexed to every estate. This, then, not being an estate for years, nor an estate at will (not being at the will of both parties, M. 14 H. 8, fo. 14 a) can be no other than an estate of freehold. It is an estate of an uncertain tenure, which *may* enure for the life of the party. The case of *Simpson, app., Wilkinson, resp.*, explains the grounds of the decision in *Davis, app., Waddington, resp.* In the subsequent case of *Ashmore, app., Lees, resp.*, the trustees had no arbitrary power of amotion: the decision turned upon the question of value,—the trustees having an arbitrary



power to reduce the weekly allowances below the sum necessary to confer the right of voting.

*Cox*, in reply.—This is not an estate dependent on the will of a stranger, but an estate determinable at the will of the grantors. [MAULE, \*658] J.—In cases of estates \*upon condition, there must be the concurrence of two things,—the happening of the contingency, and the willingness of the party entitled to take advantage of it, to do so.] Can there be a freehold where the rent is uncertain? [JERVIS, C. J.—Why not?] It is manifestly inconsistent with a freehold interest. [MAULE, J.—What is said by Brooke, J., in the Year Book M. 14 H. 8, 13 a, seems to be quite decisive.]

JERVIS, C. J.—It seems to me that the view taken by the revising-barrister in this case was correct, and that his decision must be affirmed,—the claimant having a freehold interest which entitled him to vote. It was admitted by the appellant's counsel, that the possession of a freehold interest of an uncertain duration, would entitle the party to a vote: but it was insisted that the estate which each allottee under this act has, is not an estate of an uncertain duration, within the rule laid down in Co. Litt. 42 a, because it was determinable by the deputies; and therefore that the case must be governed by that of *Davis*, app., *Waddington*, resp., 7 M. & G. 37 (E. C. L. R. vol. 49), 8 Scott N. R. 807. But, upon looking at the 8th section of the 8 & 9 Vict. c. 6, I find that each allottee is to hold his allotment "so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies." This provision is sufficient per se to create a freehold interest. But it is said that the whole scope of the act, and especially the power vested in the deputies, by s. 17, to sell the land, with the consent of the major part of the freemen, shows that it was not intended to give the allottees a freehold. If this is not a freehold, what estate is it? It clearly is not an estate for years: nor is it an estate at the absolute and uncontrolled will of the lessors. It is suggested that it is a sort of \*659] parliamentary estate, \*floating between an estate of freehold and an estate at will. It would manifestly be very inconvenient so to hold; and I do not see how we can consistently with the rules of law hold this to be any other than an estate of freehold. It is plain, according to the case of *Davis*, app., *Waddington*, resp., that, if the deputies had the power at any moment to turn out the allottees, their estate would have been a mere estate at will, and would not have conferred a vote. But this is not an estate held at the uncontrolled will of the grantors, but at the will of strangers, or subject to the consent of the deputies and the majority of the freemen, of whom the allottee is one. The estate, therefore, is held upon an uncertain event, for, it is uncertain whether the majority will consent to a sale or exchange; and therefore the case falls within the definition of an estate for life in

Co. Litt. 42 a. Consequently the claimant had a freehold interest, in respect of which he was entitled to be registered.

MAULE, J.—I also am of opinion that the claimant in this case was rightly held by the revising-barrister to be entitled to a freehold interest in his allotment. It is well established that an estate which may last for a man's life is, ordinarily, a freehold. An estate for life, determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold. Here, the duration of the estate depends upon the will of the tenant, which will not prevent its being an estate of freehold: but the estate is capable of being determined upon an event of a very special kind happening,—on the resolution of the deputies to sell or exchange the land, and the concurrence of the majority of the freemen. That is an event which is not dependent on the will of the \*lord. [\*660 There is not that arbitrary power of removal which will prevent the estate from being a freehold. It is as much out of the power of the lord to determine the estate, as if his concurrence were not necessary at all. His concurrence being necessary, does not make the concurrence of the others less independent of him. An estate which may last for the life of the grantor, though determinable under circumstances like those of this case, is clearly such an estate as according to the older authorities is an estate of freehold. The case of Davis, app., Waddington, resp., appears to have been well decided. The party claiming to vote there, was appointed by the trustees to be an inmate of the almshouses, so long as they should think fit to allow him to continue there. It was held, quite conformably with the general law, that that did not constitute a freehold interest: and it is equally clear that the interest the party in this case has is a freehold.

WILLIAMS, J.—I am of the same opinion. This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors. It comes, therefore, within the examples given in some of the older cases.

TALFOURD, J., concurred.

Decision affirmed, with costs.

\*661]

## \*ISLE OF WIGHT.

JOHN MOORE, Appellant; The Overseers of the Parish of CARISBROOKE, Respondents. Nov. 17.

A party's qualification to vote was described to be in respect of freehold land in C., which was proved to be of the yearly value of 5*l*. It appeared, however, that this land, with other land belonging to the voter (the case not showing of what description or where situate) of the yearly value of 50*l*., was mortgaged for 300*l*., and that the interest on the mortgage was 15*l*. a year:—Held, that the voter had a freehold estate in C., of a sufficient value to entitle him to be on the register.

JOHN MOORE, on the register of voters for the county of the Isle of Wight, objected to the name of James Sanders being retained on the register of voters for the said parish. The name of James Sanders stood thus on the register of voters:—

Name of Voter.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate.
Sanders, James.	Carisbrooke.	Freehold land.	Carisbrooke Fields, called Edward's Land.

It was proved that the said James Sanders was the owner of a piece of freehold land, as above described, of the annual value of 5*l*.; but that this land was (with other land of the annual value of 50*l*., belonging also to the said James Sanders) mortgaged for a sum of 300*l*., and that the interest payable on such mortgage amounted to the sum of 15*l*. by the year.

The sole objection made to the said James Sanders, was, that he was not entitled to a freehold estate of the yearly value of 40*s*. above all charges, inasmuch as each portion of the said mortgaged premises being liable to the whole of the yearly interest, such interest could not, for the purpose of conferring the franchise, without the consent of the mortgagee, be rateably apportioned on the whole property contained in the mortgage.

\*662] \*The revising barrister held that the interest *could* be so apportioned, and retained the name of the said James Sanders on the register of voters.

If the court should be of opinion that the said decision was erroneous, the name of the said James Sanders was to be expunged from the said register.

*Poulden*, for the appellant.(a)—James Sanders's right to vote rested upon his being the owner of a piece of freehold land in Carisbrooke Fields, of the annual value of 5*l*., which land was subject to an annual charge of 15*l*. for interest upon a mortgage. [JERVIS, C. J.—Together

(a) The respondents did not appear; but the necessary affidavit of service was produced.

with other land which Sanders possessed, of the yearly value of 50*l*. MAULE, J.—The land in Carisbrooke Fields is of the yearly value of one-eleventh part of the whole that is in mortgage, the net yearly value of which being 40*l*., the voter has in Carisbrooke a freehold of the clear yearly value of about 8*l*. 12*s*. 10*d*.] That result is only arrived at by the revising-barrister's having before him facts which he had no jurisdiction to inquire into, viz., the value of lands which formed no part of the voter's qualification as described in the list,—the other land not being in the same county, and, for anything that appears, not *freehold*. [JERVIS, C. J.—That was not the objection made. The consequences to which the argument would lead are monstrous.] The revising-barrister had no power to apportion the charge. If all the land had been in the same county, the claim must be made in respect of all. [JERVIS, C. J.—That is not so: it is enough to claim in respect of one farm, provided the value is sufficient.] The claim, it is submitted, must be enough in one county to cover the entire charge. The revising-barrister has no power to inquire into anything that is \*not comprised in the list. It would be raising a collateral issue, which the act [\*663 of parliament never could have contemplated. [JERVIS, C. J.—We must look at the real value of the interest the party has, and the amount to be paid out of it. MAULE, J.—Have you any authorities to support your view?] None.

JERVIS, C. J.—The decision was right. The case is a very plain one. If it had been objected before the revising-barrister, as it is now urged before us, that the other land included in the mortgage was not freehold, the proof would have been supplied, and it would probably have been shown to be adjoining the other land. We must assume it was in the same county. In short, we must assume any conceivable state of facts to support the decision of the revising-barrister in that respect.

MAULE, J.—This man is found substantially to be seised of an estate of 40*l*. a year clear of all charges, of which the land in respect of which he claims to vote is one-eleventh part. He has, therefore, an estate, in respect of which he claimed, of which the clear yearly value is one-eleventh part of 40*l*., or 8*l*. 12*s*. 10*d*. and a fraction.

The rest of the court concurring,

Decision affirmed.

\*664]                   \*LANCASHIRE.—Southern Division.

CORBYN BARROW and Others, Appellants; HENRY BUCKMASTER, Respondent. Nov. 17.

The owners of a piece of land which was held by them subject to a rent-charge of 14*l.* 1*s.* 7*d.* per annum, conveyed a portion of it to eight persons, as tenants in common in fee, subject to the payment of 4*l.* 5*s.* per annum as their proportion of the rent-charge,—the grantors covenanting to pay the remainder themselves, or to indemnify the grantees therefrom, and reserving to the latter power to distrain upon the rest of the land for any excess of the rent-charge which they might be compelled to pay. It was admitted that the residue of the land was of sufficient value to satisfy the portion of the rent-charge so agreed to be paid thereout:—

Held, that, although in point of law the land so conveyed was liable to the whole rent-charge of 14*l.* 1*s.* 7*d.*, yet, for the purpose of the elective franchise, the interest of the eight grantees was to be taken to be, the value of the land conveyed to them, after deducting the proportion only of the rent-charge covenanted to be paid by them.

HENRY BUCKMASTER objected to the names of Corbyn Barrow and seven other persons being retained on the list of voters for the township of Hulme, in the southern division of the county of Lancaster.

The facts were as follows:—The several persons whose names were objected to as above mentioned claimed to be entitled to a vote in respect of an undivided share of two freehold houses, which they each held.

The ground upon which these houses stood, formed part of a plot of land which was, on the 31st of July, 1853, and still remained, charged with and liable to an original chief-rent, being a perpetual yearly rent of 14*l.* 1*s.* 7*d.* payable out of the same to an original grantor, with the usual power of distress.

The fee-simple of the plot of land in question, subject to the chief-rent above mentioned, became vested in Charles Duffield, James Loft-house, and George Whitworth, who granted that portion of it on which the two houses stood, in fee-simple, to the parties claiming to vote, and others, to the number of ten altogether, as tenants in common.

The deed by which such grant was made, recited that the said Charles Duffield, James Loft-house, and George Whitworth, were seised of the \*665] fee-simple of the land on \*which the houses stood, “subject, nevertheless, with other adjoining hereditaments, messuages, and premises now belonging to the said conveying parties, to a perpetual yearly rent of 14*l.* 1*s.* 7*d.*” The deed then went on to grant the land on which the two houses stood, to the parties above named, “subject only to a proportion, viz., the sum of 4*l.* 5*s.*, of the said yearly rent.”

The conveying parties then covenanted to pay the remainder of the said chief-rent of 14*l.* 1*s.* 7*d.*, viz., the sum of 9*l.* 16*s.* 7*d.*, and to keep the grantees indemnified against all losses, damages, expenses, and proceedings which might arise by reason of the non-payment of the said 9*l.* 16*s.* 7*d.*, and further covenanted, that, if default should be made in the payment of the said 9*l.* 16*s.* 7*d.*, or any part thereof, that there-

upon it should be lawful for the grantees to enter and distrain for so much as should have been required to be paid (by them), upon the remainder of the said plot of land.

The grantees then covenanted with the grantors, in a similar manner, that they would pay their proportion of the said chief-rent of 14*l.* 1*s.* 7*d.*, viz., the sum of 4*l.* 5*s.*, and gave a similar indemnity and power of distress, in case of default made.

The objection made to these parties, was, that their freehold share of the two houses was not of the requisite value to confer a vote.

If, for the purpose of conferring a vote, the annual value of the houses was to be calculated, after deducting any further portion of the original chief-rent charged and payable as aforesaid than the sum of 4*l.* 5*s.*, being the proportion above named, the value of the houses would *not* be sufficient to confer a vote on the parties.

If no further portion of the original chief-rent than the said sum of 4*l.* 5*s.* was to be taken into account, by way of deduction, in ascertaining the value of the houses, and the houses to be considered, for that purpose, as liable *only* to the payment of the said sum of 4*l.* 5*s.*, the value of the houses *would be* sufficient to confer a vote [\*666] on the several claimants.

The revising-barrister decided, that, as the land on which the houses stood was still liable, in conjunction with the rest of the plot, to the whole chief-rent of 14*l.* 1*s.* 7*d.*, though the parties had a collateral indemnity against the payment of more than the above-mentioned portion of it, the value was insufficient; and he disallowed the votes, and removed the names from the register.

*Byles*, Serjt. (with whom was *Aspland*), for the appellants.—This case is identical with that of *Moore*; app., *Carisbrooke*, resp., ante, p. 661, save that it is the case of a rent-charge, instead of a mortgage. The facts are shortly these:—A plot of land, of which the ground on which the two houses in question stand forms a part, is charged with a rent-charge of 14*l.* 1*s.* 7*d.* per annum. The owners convey a portion of it to the claimants, subject to a proportion, viz., 4*l.* 5*s.* of the rent-charge, with a covenant by the grantors to pay the residue, and a reservation of a power of distress to the grantees, in the event of their being called upon to pay the whole 14*l.* 1*s.* 7*d.* [*MAULE, J.*—It does not appear what the value of the residue of the land is. *Cowling.*—It may be assumed to be of sufficient value to raise the question.] If this charge is incapable of being apportioned so as to give the appellants the right of voting, the consequence would be, that, if an estate worth 500*l.* a year descended to five daughters(?), or to five sons in *Kent*, or to five devisees, in equal portions, and the whole estate were charged with 100*l.* per annum, *all* the parties would be disfranchised. The question arises upon the construction of the 8 H. 6, c. 7, the 10 H. 6, c. 2, and the 18 G. 2, c. 18, s. 5. The 8 H. 6, c. 7, which is intituled “What

\*667] \*sort of men shall be choosers, and who shall be chosen, knights of parliament," recites that "the elections of knights of shires to come to the parliaments of our lord the King, in many counties of the realm of England, have now of late been made by many great, outrageous, and excessive number of people dwelling within the same counties of the realm of England, of which most part was of people of small substance, and of no value, whereof many of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same counties, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties shall very likely rise to be, unless convenient and due remedy be provided in this behalf;" and provides, ordains, and establishes, "that the knights of the shires to be chosen within the same realm of England to come to the parliaments of our lord the King, hereafter to be holden, shall be chosen in every county of the realm of England, by people dwelling and resident in the same counties, whereof every one of them shall have *free land or tenement to the value of 40s. by the year at the least, above all charges*; and that they which shall be so chosen shall be dwelling and resident within the same counties; and such as have the greatest number of *them that may expend 40s. by the year, and above, as afore is said*, shall be returned by the sheriff of every county, &c.; and every sheriff shall have power to examine upon the Evangelists every such chooser, *how much he may expend by the year*," &c.: "Provided always, that he which cannot expend 40s. by the year as afore is said, shall in no wise be chooser of the knights for the parliament," &c. The 10 H. 6, c. 2, which professes to explain that act, provides "that the knights of all counties within the said realm to be chosen to come to parliaments hereafter to be \*668] chosen shall be chosen in every county by people \*dwelling and resiant in the same, *whereof every man shall have freehold to the value of 40s. by the year at the least, above all charges*, within the same county where any such chooser will meddle of any such election." And the 18 G. 2, c. 18, s. 5, which explains the term "charges," enacts "that no person shall vote in any such election, without having a freehold estate in the county for which he votes, of the clear yearly value of 40s., over and above all rents and charges payable out of or in respect of the same." The result of these enactments, is, that the right to vote depends upon the party's having 40s. a year to expend out of the freehold, after satisfying all charges thereon. As between these terre-tenants, there would be a right to enforce contribution in respect of this rent-charge (improperly called a chief-rent), in equity certainly, and probably in law. The question arose, but was not decided, in *Curtis v. Spitty*, 1 N. C. 756, 1 Scott, 787. The opinion of the court there seems to have been, that, *in debt*, the rent would have been apportionable even against the lessor. In giving judg-

ment, Tindal, C. J., says: "The proposition contended for by the plaintiff, is this,—that the lessor may charge the assignee of part of the land, in *an action of debt*, with the rent of the whole land comprised in the original demise. He may, undoubtedly, after an assignment of part, *distrain* upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each and every part of the land: but, in that case, it must be remembered that the avowry would be for rent due from the original tenant, and nothing would appear upon the record as to the assignment. The remedy by distress does not, therefore, afford any authority for the remedy by a direct *action of debt against the assignee*, which action, depending [as it does upon the privity of contract being transferred to the assignee by reason of the privity of estate, that is, by \*reason of the plaintiff being the landlord and the defendant the tenant of the same land, opens a very nice and difficult question, [\*669 not settled by any decision in the books, so far as we can ascertain, viz. whether there exists a privity of estate in respect of the whole land, by an assignment of part only." [MAULE, J.—In what proportions is the charge to be apportioned?] According to the value of the several portions of the land. Here, the case finds the value. Dr. Story, in his *Equity Jurisprudence*, 8d edit. § 475,—where, and in some subsequent sections, all the authorities upon the subject, both at law and in equity, are collected,—says: "Apportionment was well known at the common law; and sometimes it denoted the contribution which was to be made by different persons having the same right, towards a common burden or charge upon all of them; and sometimes it denoted a subdivision or extinguishment of a portion of a charge held by a single individual. Thus, for instance, if a man had a rent-charge, and purchased a part of the land out of which it issued, the whole rent-charge was extinguished. But, if a part of the land came to him by operation of law, as, by descent, there the rent-charge was apportionable; that is, the tenant and the heir were to pay according to the value of the lands respectively held by them; and, of course, the part apportionable on the heir was extinguished. So, if a lessor granted part of a reversion to a stranger, the rent was to be apportioned." In an Anonymous case, Cary Rep. 8, it is said: "If a man grant a rent-charge out of all his lands, and afterwards selleth his lands by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in the Chancery by a contribution from the rest of the purchasers." It is clear, therefore, that, independently of the indemnity contained in the deed, these claimants would have a right \*to contribution in respect of this rent-charge, from [\*670 the owners of the rest of the land. Consequently, the result is, as the revising-barrister has found, that each of these claimants has a freehold exceeding the clear yearly value of 40s. after deducting the proportion of the charge to which their land is fairly liable; for, the



charge to be looked at, is, the ultimate charge, after all legal and equitable remedies for contribution are exhausted. This question, as it respects mortgages, has undergone discussion before election committees; and they have almost uniformly decided as this court decided in *Moore, app., The Overseers of Carisbrooke, resp.* In *Beaumont's case*, 2 Peck. 103, the mortgage greatly exceeded the value of the particular estate in right of which the vote was given; but, it appearing that there were other estates conveyed also in mortgage by the same deed, the rents and profits of which were much beyond the interest of the sum borrowed, the committee determined the vote to be good. The Bedfordshire committee, in *Stringer's case*, 2 Luders, 469, decided that the evidence of interest of a mortgage reducing the annual value of the estate, was conclusive, notwithstanding any other property possessed by the voter. "But this," says Mr. Elliott, in his work on Registration, 2d ed. p. 84, "must be understood of property not charged with the mortgage, for, otherwise, the proposition is too general." And the same writer says, p. 85,—“The true principle is that of contribution, which a court of equity will enforce:” *Long v. Short*, 1 P. Wms. 403, 8 Vern. 756. And see *Shepherd on Elections*, 2d edit. p. 17.

*Cowling*, for the respondent.—Prior to the passing of the 8 H. 6, c. 7, the right of voting in the election of members for the county, was exercised by all who possessed freehold property within the county, of whatever value it might be. That statute limited the right \*671] to those who were the owners of free lands or tenements of the value of 40s. a year at the least above all charges. The statute must receive the same construction now which it would have received at the time of its passing; and at that time it is well known that real property was the principal source of income in this kingdom. The legislature appears to have looked to the issues of the land for the voter's qualification. The voter is to have a freehold of the value of 40s. a year at the least above all charges, that is, exclusive of all legal charges upon the land. The sheriff is to examine the party upon the Evangelists, “how much he may expend by the year.” That is necessarily a mere extempore inquiry: he cannot enter upon any elaborate and complicated questions, or examine witnesses. By the 18 G. 2, c. 18, s. 5, the estate is to be “of the clear yearly value of 40s. over and above all rents and charges payable out of or in respect of the same.” In *Gilbert on Rents*, 154, it is said, that, “when a rent-charge is granted out of land, the rent issues out of every part of the land, and consequently every part of the land is subject to a distress for the whole rent.” This land, therefore, is subject to the whole rent-charge of 14l. 1s. 7d.; and the sheriff has no power to inquire into the value of the rest of the land over which the charge extends: the indemnity may be worthless. The matter is not *res integra*. The statute has received a strict construction: it has been held that the party must

have the *legal* interest. Thus, in Heywood on County Elections, 2d edit. p. 104, it is said: "The doctrine of uses and trusts was wholly unknown at common law; but the convenience attending it was soon after its introduction almost universally felt. The statute of 8 H. 6, requiring a person to have freehold tenements to the value of 40s. per annum, has always been confined to persons having the *legal* estate in freehold tenements of that value; and, in consequence, if the law \*had been strictly enforced after uses became common, the greater part of the landholders of England must have been disqualified to vote. Lord Coke's observations upon the statute 2 H. 5, st. 2, c. 3, strongly illustrates this. That act provides, that, to be a jurymen, in certain cases, a person ought to have lands or tenements of the annual value of 40s., besides the reprises thereof: and, he observes, that, owing to the troubles occasioned in this country by the quarrels between the houses of York and Lancaster, the greatest part of the lands in England were, at the making of this statute, *in use*; and, although in law the land was in the feoffees, yet, because they had it but in trust, and cestui que use took the whole profits, the judges applied this law, which is a remedial one, by equity, against the letter of it, to the cestui que use, and not to the feoffee. How far, in like manner, the judges might have extended the 8 H. 6 by equity, is not the question now; those tribunals by which it has been construed having taken the contrary line, and confined it strictly to the letter. The legislature, at length, when contests for counties grew more frequent, and the rights of voters were more strictly scrutinized, found it necessary to remove a disqualification which affected a vast number of freeholds, and enacted by 7 & 8 W. 3, c. 25, s. 7, 'that no person or persons should be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust-estate or mortgage, unless such trustee or mortgagee should be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor or cestui que trust in possession should and might vote for the same, notwithstanding such mortgage or trust.' Upon this clause must be founded the right of any person to vote for a trust-estate." The effect of that statute is, that the mortgage, though a legal mortgage, shall in future be considered only as an equitable mortgage. [JERVIS, \*C. J.—It substitutes the equitable for the legal estate; but it still leaves the question of value.] If that act had not passed, [\*673 the decision in Moore, app., The Overseers of Carisbrooke, resp., antè, p. 661, would have been different. [JERVIS, C. J.—Or, rather, the question could not have arisen. MAULE, J.—In the ordinary case of a mortgage, is the interest a charge payable out of or in respect of the land?] Yes: the statute 7 & 8 W. 3, c. 25, s. 7, so makes it. [JERVIS, C. J.—You say the statute of 8 H. 6, c. 7, is to receive a legal, that is, a strict construction. Suppose, before the statute 7 & 8 W.

3, the land was mortgaged, not in fee, but for a term,—would not the sheriff take that into consideration in ascertaining the value? That shows that the statute means, what the voter may expend after satisfying all charges resting upon the land ultimately.] It is not suggested that the 7 & 8 W. 3 has made any difference as to the rights of the mortgagor and mortgagee, as between themselves; but only for election purposes. [MAULE, J.—The statute 8 H. 6, c. 7, obviously points to the criterion of freehold property as a measure of the social position of the voter. To entitle him to vote, his interest must *substantially* be of the value of 40s. a year. The difficulty of its not being a legal freehold is got rid of by the statute of 7 & 8 W. 3.]

*Byles, Serjt., in reply.*—To entitle him to vote, the party was required to satisfy the sheriff that he had 40s. a year out of the land, which he might expend, after satisfying all charges legally payable in respect of the same. The language of the court in *Lee, app., Hutchinson, resp.*, 8 C. B. 16 (E. C. L. R. vol. 65), 1 Lutw. Reg. Cas. 160, is conclusive to show that it is the substantial value of the land, after all remedies legal and equitable are exhausted, that must be looked to. [JERVIS, C. J.—It has occurred to me throughout the argument that that \*674] \*case was decisive of the present.] In *Webb, app., The Overseers of Birmingham, resp.*, 5 M. & G. 14 (E. C. L. R. vol. 44), 7 Scott, N. R. 545, 1 Lutw. Reg. Cas. 18, *Coltman, J.*, says: “The effect of the argument is, that a lessee has an interest in the whole and not in each and every part of the premises in respect of which the term is created. It appears to me that the lessee has an interest in every part, as well as in the whole. I cannot conceive that the words of that clause (2 & 3 W. 4, c. 45, s. 20) restrictive of the yearly value, at all tend to show that there is such entirety in the term as is contended for. The premises are to be ‘of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same:’ now, though the rent is payable out of the whole, it is clearly apportionable among the several tenements, according to the value of each; and, if so, the term is in its nature apportionable also.” Without the express indemnity in this case, the law would apportion the charge. There clearly is no valid distinction in this respect between a rent-charge and a mortgage.

JERVIS, C. J.—I am of opinion that the revising-barrister was incorrect in the view he took in this case, and that the claimants were entitled to be on the register. The case does not state, but it was admitted to be the basis of the revising-barrister’s decision, that the residue of the land not covered by houses, in respect of which the right to vote is claimed, is sufficient to answer the balance of the charge beyond the 4*l.* 5*s.* allotted upon the houses, if fairly apportioned. It seems to me, therefore, that the amount to be deducted from the value of the premises, is 4*l.* 5*s.*, and not 14*l.* 1*s.* 7*d.*, the original rent-charge, which

undoubtedly is legally chargeable upon the whole and every part of the land. It is admitted that the question turns upon the construction of the \*8 H. 6, c. 7, as varied and explained by the subsequent statutes. The voter must possess a freehold of the value of 40s. [\*675 by the year above all charges. The question is, what is the meaning of that provision. That is to be gathered from other parts of the act. The sheriff is to examine the voter, or chooser, in order to ascertain "how much he may expend by the year." I think the view taken by my Brother Byles is the correct one,—that the true question here is, not what are the charges upon the land in the first instance, but what, in the result, after exhausting all legal remedies against the remainder of the land, the claimants would be fairly entitled to expend. It is admitted, that, if the rent-charge were apportioned equally over the whole, the claimants here would each receive more than 40s. a year: therefore, it is clear that each could out of this land expend 40s. by the year. But it is said that the claimant could not truly say that he had 40s. a year to expend, because the land is subject to a charge of 14*l.* 1*s.* 7*d.* It is not, however, denied by the counsel for the respondent, that though, in the first instance, the two houses in respect of which these parties claim to vote are legally liable to the whole rent-charge, yet the claimants are, either at law or in equity, entitled to recover 9*l.* 16*s.* 7*d.* from the grantors or from the owners of the other portion of the land; so that, when the account is taken between them, each may fairly say that he has 40s. a year to expend out of the land. That seems to me to be the fair and sensible construction of the act. I do not quite follow the argument urged on the part of the respondent, as to the difference between this case and that of the mortgage. When the statute 7 & 8 W. 3, c. 25, s. 7, substituted an equitable for a legal estate, I take it it must be an equitable estate of the same value as the freehold under the other statute: and, as we held the other day, in Moore, app., *The Overseers of Carisbrooke, resp., antè*, \*p. 661, [\*676 that, in the case of an equitable estate, we are to look at the substantial value of the party's interest, when all legal remedies have been exhausted, I apprehend the same rule must follow in the case of a legal estate. The case of Lee, app., *Hutchinson, resp.*, in principle confirms that position. There, the respondent was registered in respect of a freehold of the yearly value of 5*l.*, upon which he had borrowed by way of mortgage 100*l.*: there was no absolute covenant for payment of interest on the advance, but by mutual consent 5*l.* per cent. per annum had been paid: and the court held, that he had not an estate out of which he could expend 40s. by the year, because the whole was absorbed by the interest,—looking to the substantial value to the party after all the legal and equitable rights as between himself and his creditor were exhausted. So, here, inasmuch as the claimant will in the end be found to be entitled to more than 40s. by the year, above all

charges, he is entitled to be registered. Upon these grounds, I am of opinion that the decision of the revising-barrister was wrong, and that the names of the appellants must be inserted in the register.

MAULE, J.—I am of the same opinion. The appellant in this case is a person who within the meaning of the statute 8 H. 6, c. 7, may expend 40*s.* by the year. It has been pointed out by my Brother Byles, in the course of the argument, and not successfully disputed by Mr. Cowling, that, notwithstanding the freehold in respect of which he claims is charged with, and liable to a distress for, a chief-rent of 14*l.* 1*s.* 7*d.*, which exceeds the value of his interest therein, yet that he may by enforcing his remedy against those jointly liable with him for that charge, enable himself to expend 40*s.* a year out of this land. He is, therefore, a person who satisfies the requirements of the statute 8 H. 6, c. 7. The argument \*urged by Mr. Cowling, is, that the \*677] meaning of the statute is, not that the party must be of ability to expend 40*s.* a year out of the land after enforcing all his rights, legal and equitable, in respect of it; but that he must have 40*s.* a year beyond anything that may be primarily charged on the land. No reason has been shown why such an artificial construction should be put upon the statute; and it seems to me that the words exclude it. They are not words of a technical, but of a popular description, referring to a matter which is to be the subject of inquiry by the sheriff in the exercise of his ministerial functions, on examination of the choosers or voters. The words are, that “the knights of the shires to be chosen within the realm of England to come to the parliaments of our lord the King hereafter to be holden, shall be chosen in every county of the realm of England, by people resident and dwelling in the same counties, whereof every one of them shall have free land or tenement to the value of 40*s.* by the year at the least above all charges:” and “every sheriff shall have power to examine upon the Evangelists every such chooser, how much he may expend by the year.” Words less technical than these, I cannot well conceive. If I have land of the annual value of 5*l.*, in respect of which I am subject to a charge of 4*l.* a year, my interest therein is not reduced below 40*s.*, if I have a remedy over against a third party, to the extent of three-fourths of the charge. I cannot see any sound answer to that. The statute 8 H. 6, c. 7, seems to me to have been accurately expounded by my Brother Byles. The main argument urged by Mr. Cowling (which has no immediate bearing upon the real question before the court) turns upon the statute 7 & 8 W. 3, c. 25, s. 7, which enacts “that no person or persons shall be allowed to have any vote in elections of members to serve in parliament, for or by reason of any trust-estate or mortgage, unless such \*678] \*trustee or mortgagee shall be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor or cestui que trust in possession shall and may vote for the same, not-

withstanding such mortgage or trust." The whole scope of the argument, as far as I was able to understand it, was directed to show that there is no analogy between this case and the case of a mortgage. It still leaves the principal point, as to the construction of the statute 8 H. 6, c. 7, untouched. The statute 7 & 8 W. 3, c. 25, s. 7, enacting that the mortgagor shall have the right to vote, that, says Mr. Cowling, is equivalent to turning the equitable into a legal interest; so that the statute is in effect to be construed as if it had said, that, from henceforth, the interest of the mortgagor shall be treated as a legal interest, and the mortgagee's right to his interest, which is now a legal right, shall be considered as a mere equitable right,—not as between the mortgagor and mortgagee, but for election purposes. Having got the word "equitable" into the act by that artificial process, the learned counsel insists that the statute is to be construed with reference to the charge thus equitably distributed over the whole land. I think that mode of dealing with the act of parliament is altogether inadmissible; for, you cannot substitute for the words actually used, others that are capable of a construction of which the words used are not susceptible, and then construe the statute as if the legislature had used the words so substituted. I cannot see that that argument has any value, when duly dealt with. It can only have the effect of diminishing the weight of some authorities which have been cited, of which Lee, app., Hutchinson, resp., is one. That is the case upon which our decision on this occasion must in reality turn. It bears a very strong analogy to the substance of the present case. The thing to be looked at, upon the two statutes together, is, what may the party \*expend out of the land,—what charges are the proper subject of reduction. If [\*679 he has 40s. a year after all his liabilities in respect of the land are satisfied, he is entitled to vote.

WILLIAMS, J.—I am of the same opinion. Having regard to the principle of the statute 8 H. 6, c. 7, I think we should merely look at the amount of the charge which ultimately will be cast upon the tenant. Looking at the circumstances of the particular case, it appears, that, after all his rights against the other parties have been enforced, the amount of the charge to be borne by the claimant will not diminish his interest below 40s. per annum. I therefore think the decision of the revising-barrister was wrong, and must be reversed.

TALFOURD, J.—I am of the same opinion. The charges mentioned in the 8 H. 6, c. 7, are to be understood to mean such as reduce the annual value, so as not to leave the party 40s. per annum to expend. Mr. Cowling justly observes that the statute is to be expounded by us as if we were living in the age in which it was passed, and that the property mainly regarded at that time was land. The inference I draw from that, is, that the criterion of the party's eligibility to enjoy the franchise, was, his ability to expend 40s. a year out of the land,

after all practical charges thereon were satisfied. The case of Lee, app., Hutchinson, resp., is the precise converse of this, and is in harmony with the principle upon which that of Moore, app., The Overseers of Carisbrooke, resp., was decided.      Decision reversed.

\*680]

## \*CITY OF CARLISLE.

THOMAS FEDDON, Appellant; JOHN SAWYERS, Respondent.  
Nov. 25.

A notice of objection to a party's right to vote in the election of members for the city of C., described the objector as being "*on the list of freemen for the city of C.*"

There are several townships in C., the overseers of which severally make out and publish lists of persons entitled to vote in respect of occupation; and there is also a list made out and published by the town clerk, which is intitled "*The list of freemen of the city of C., entitled to vote in the election of members for the said city.*"

Under the municipal corporation act, 5 & 6 W. 4, c. 76, s. 5, the town clerk also makes out and keeps (but does not publish) a list of the freemen of the city, called "*The freemen's roll.*"

Held, by Jervis, C. J., Williams, J., and Talfourd, J. (dissentiente Maule, J.), that the above notice of objection was a sufficient compliance with the 6 & 7 Vict. c. 18, s. 17, inasmuch as any person reading it must understand that the objector intended to state that his name was *on the list of freemen entitled to vote in the election of members.*

JOHN SAWYERS, whose name was on the register of voters for the city of Carlisle for the time being, objected to the name of Thomas Feddon being retained on the list of freemen entitled to vote in the election of members for the city of Carlisle.

The name of Thomas Feddon was on the list published by the town-clerk, of persons entitled to vote. Notices of objection had been duly served on the town-clerk, and on Thomas Feddon; but the notice of objection which had been so served on Thomas Feddon was in the words and figures following:—

"To Mr. Thomas Feddon, of Cornthwaite.

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the city of Carlisle. Dated, the 22d day of August, 1852.

(signed) "JOHN SAWYERS,

"Botchergate, Carlisle,

*On the list of freemen for the city of Carlisle.*"

It was proved, and the revising-barrister found, that there are several townships in the city of Carlisle, with separate overseers; and that  
\*681] the overseers of the different townships make out and publish different lists of persons entitled to vote in the election of members for the city, in respect of the occupation of property within the city. The revising-barrister further found that the town-clerk makes out and publishes in each year a list of freemen entitled to vote in the election

of members for the city. He found that the heading of the said list of freemen is in manner and form following:—"The list of freemen of the city of Carlisle, entitled to vote in the election of members for the said city."

He found that it is the duty of the town-clerk to keep printed copies of the said list for sale, and that he is in the habit of selling such copies. He found further that there is kept in the town-clerk's office another list of the freemen of Carlisle, which is the list or roll of all the freemen of the city, made and kept in pursuance of the municipal corporation act, 5 & 6 W. 4, c. 76; that the proper and ordinary name of such list, is,—*"The freemen's roll;"* that such list is not published, though it may be inspected at the town-clerk's office; that it is in no way connected with the lists made of persons entitled to vote in the elections of members for the city; that there is but one list of the freemen of the city relating to the election of members for the city, which is the list made and published annually by the town-clerk as above mentioned; and that the name of John Sawyers was in fact upon that list of freemen.

It was contended, on behalf of the said Thomas Feddon, that the notice of objection was insufficient, because the objector had not therein described himself as being a voter for the city, and had not shown upon the face of the notice that he was a person entitled to object to the name of the said Thomas Feddon being retained on the list of voters, and had not shown that he was a person to whose objection the said Thomas Feddon was bound by law to pay attention.

\*It was further contended that the notice was insufficient, because the objector had not described himself as being on the list of freemen entitled to vote for the city, but only as being on the list of freemen for the city; that the notice was not according to the form in the schedule to the 6 & 7 Vict. c. 18; that the said notice tended to mislead the said Thomas Feddon; and that the said John Sawyers had not duly exercised the power conferred upon him by the statute 6 & 7 Vict. c. 18. [\*682]

It was contended on behalf of the said John Sawyers, that he had duly exercised the power conferred upon him by law; that the notice was sufficiently accurate; that the voter could not be misled; and that there was only one list of freemen, viz. the list of freemen entitled to vote in the election of members for the city, to which any reasonable person would refer, on receiving such a notice.

The revising-barrister held that the notice was sufficiently accurate, and that the said John Sawyers had duly exercised the power conferred upon him by law: and, the said Thomas Feddon being unable to sustain his right to be on the list of voters for the city of Carlisle, he struck out his name from the list.

If the court should be of opinion that the above notice of objection



was a bad notice, the names of Thomas Feddon, and of twenty-eight other persons whose appeals depend upon this decision, were to be restored to the said list.

*S. Temple*, for the appellant.—The revising-barrister was wrong in holding this notice of objection sufficient. The party objected to has a right to know that the party objecting is entitled to object. The question turns upon the 17th section of the 6 & 7 Vict. c. 18, which enacts that “every person whose name shall have been inserted \*683] in any list of voters for any city or borough, may object to any other person as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the twenty-fifth of August in that year, give or cause to be given a notice, according to the form numbered 10 in the said schedule B., or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough; and every person so objecting shall also give or cause to be left at the place of abode of the person objected to as stated in the said list, a notice, according to the form numbered 11 in the said schedule B.; and every notice of objection shall be signed by the person objecting.” In both the forms referred to, the party is made to describe himself as “on the list of voters for the parish of \_\_\_\_\_.” The objector here, to bring himself within the act, should have described himself as being “on the list of freemen of the city of Carlisle, entitled to vote in the election of members for the said city,” and not as he has done, which was calculated to mislead the party to whom the notice was addressed, seeing that there is a list to which the description more appropriately applies, viz., the freemen’s roll, which is kept for municipal purposes. [JERVIS, C. J.—The 101st section provides “that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with \*684] respect to such person, place, or thing, provided that such \*person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood.” Now, would not any person, looking at this notice, “commonly understand” that the objector meant to describe himself as being on the list of persons entitled as freemen to vote in the election of members for the city of Carlisle?] The 101st section does not obviate the objection. The objector is bound in the notice to show that he is a person who is in a position to object: it is not to be left to conjecture. Suppose the objector’s name was John Smith, and there were two of that name,

one of whom only was on the list of persons entitled as freemen to vote, the other being on the municipal list only,—would a notice in this form, signed John Smith, be a good notice? Clearly not. We must look at general principles. [JERVIS, C. J.—It is better to look at each notice, to see if it is calculated to mislead. This is very like the case of Lambert, app., The Overseers of St. Thomas, New Sarum, resp., ante, p. 642.] It may be that some who are on the freemen's list, are disqualified from being on the list of freemen entitled to vote for members, by reason of their having received charity. In Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517, the objector was described, in a notice under this section, as “R. F., of, &c., on the list of voters for the borough of L.” It appeared that the register of voters for the borough of L. consisted of four separate lists, viz., one of 10l. householders for each of three townships comprised in it, and one of the freemen of the borough; and that the objector's name was on the last-mentioned list only: and it was held, that he was insufficiently described in the notice, and that the inaccuracy of description was not cured by the 101st section. Wilde, C. J., there says,—“Here, the notice of objection states the name and place of abode \*of the objector, and then adds, ‘on the list of voters for the borough of Lancaster.’ Now, in one sense, *all* the lists consti- [\*685 tute *the* list for the borough, and the notice, therefore, is by no means so precise as the statute requires it to be, and is not calculated to afford that information to the party objected to which it was intended should be supplied. It seems to me that the notice of objection was insufficient. If that be so, the question arises, whether it was competent for the revising-barrister to treat the omission as an inaccuracy, and to hold that the notice of objection was valid, because the ‘list of voters’ mentioned in the notice was such as was ‘commonly understood’ to mean the list of freemen of the borough. There is nothing in the statement of facts to show that, ‘on the list of voters for the borough’ was commonly understood to mean ‘on the list of freemen entitled to vote for the borough:’ and, since the barrister is not empowered to dispense with the requirements of the act, I think he was not at liberty to amend the notice in this respect. None of the cases which have been cited at all break in upon the principle on which I ground my opinion, and therefore it seems to me that the decision of the revising-barrister was wrong.” [MAULE, J.—It is idle to talk about *amending* a document whose only function is, to bring the party served before the barrister.] It may be conceded that that case is in some respects distinguishable from the present: but, at all events, it is an authority to show that the party objected to has a right to know that the party objecting has the right to set him in motion, to put him to the expense of proving his qualification. [JERVIS, C. J.—If this man had said “on the list of freemen *voters* for the city of Carlisle,” that would have

done, would it not?] Possibly it would. The notice, as framed, is not in the form given in the schedule; nor is it "to the like effect;" \*686] for, \*if it be a material ingredient in the right to object, that the objector shall be on a list of persons entitled to vote, the allegation is a material one, and the omission of it prevents the notice from being such a one as the statute requires.

*Mellor*, for the respondent.—These notices have been held to be insufficient where the objector has omitted to refer to the particular list to which his objection applies, as in *Wansey, app., Perkins, resp.* (Quigley's case), 7 M. & G. 127 (E. C. L. R. vol. 49), 8 Scott, N. R. 951, 1 Lutw. Reg. Cas. 235; or to the particular list in which his name appears, as in *Tudball, app., The Town Clerk of Bristol, resp.*, 5 M. & G. 575, 7 Scott N. R. 486, 1 Lutw. Reg. Cas. 7, and *Eidsforth, app., Farrer, resp.*, 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517. But those cases, when closely examined, will be found to support the validity of the present notice. It is a compliance in terms with the act; or, if not, the mistake is cured by the 101st section. The forms given do not require the party to adopt the entire particularity of the heading of the list. The party objected to here must have known that it was not "the freemen's roll" that was referred to. He could not possibly have been misled. [MAULE, J.—Does the objector allege with sufficient distinctness that he has the statutable qualification to make the objection?] It is submitted that he does. [MAULE, J.—Suppose the party *fancied* that his being on the freemen's roll entitled him to object,—would the revising-barrister visit him with costs? The substance of s. 17 is, that the right of the objector to object shall be apparent on the face of the notice; which right consists in his being on a list of voters. Now, the thing which confers the right to object is not described at all here.] The inaccuracy is cured by the 101st section. \*687] A notice which altogether omits the \*description of the objector cannot be sufficient; but a mere inaccuracy of description, so that it be "commonly understood," will not vitiate the notice. In effect and in substance this is a sufficient compliance with the statute; and therefore the revising-barrister's decision should be affirmed.

*Temple*, in reply.—This is not an inaccuracy of description such as the 101st section was intended to cure. [WILLIAMS, J.—Do you contend that this notice would not have been understood by a person of ordinary intelligence?] This case does not depend upon whether the party may or may not have been misled: but it is submitted that the appellant was entitled to see that the party objecting had a right to object, before he was bound to take any step in defence of his vote.

*Cur. adv. vult.*

There being a difference of opinion amongst the learned judges, they now proceeded to deliver their judgments *seriatim*.

JERVIS, C. J.—In this case, the court, in consequence of a want of

unanimity, took further time for deliberation. The same difference of opinion still existing, we will proceed to state our several views of the question which has been argued before us. I think the result at which the revising-barrister arrived was the correct one, that the notice of objection was sufficient, and consequently that this appeal must be dismissed.

The question arises upon the sufficiency of the notice of objection to the name of Thomas Feddon being retained on the list of voters for the city of Carlisle. By the 17th section of the 6 & 7 Vict. c. 18, no \*person has a right to object to another person as not being entitled to have his name inserted in any list of voters unless he [\*688 has given a notice in the form, or to the effect, set out in the schedule there referred to. The form given shows to a certain extent what it is that is required under that section; but that form is not applicable to the case where the objector has the right of voting as a freeman, but where his right consists in his being a householder. The question, therefore, is, what is the proper construction of the section itself. The 101st section, I think, affords some light: it enacts "that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in any wise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." I think the fair meaning of that section is, that, in dealing with these notices, we are not to put a mere technical and critical construction upon them, but to look at them as persons of plain common sense would read them: and, if we see that the objector in his notice so describes himself as that any man of ordinary intelligence may understand what he means, the notice is a sufficient compliance with the act. It appears that, in the city of Carlisle, there are two classes of lists to which it is necessary for this purpose to refer,—one, a list of the freemen of the city entitled to vote in the election of members,—the other, the list of householders made out by the overseers of the several townships, in which case it is necessary to state in which parish the respective voters are householders. But the same necessity which applies to these last, does not apply to the list of freemen, which is made \*out by the town-clerk. Regard being had to the subject-matter [\*689 of this notice, which applies exclusively to the exercise of the parliamentary franchise, I think any person of ordinary intelligence upon looking at it would see that the objector meant to describe himself as upon the list of freemen entitled to vote in the election of members for the city of Carlisle. Upon that short ground,—taking a fair and liberal view of the matter, I cannot come to any other conclusion than that this notice is so framed as to be commonly understood

to impart all the information which the 17th section intended it should convey.

I quite agree, that, if we were to look at the instrument critically and technically, we must see that it is quite consistent with the objector's name being on "the freeman's roll" only, for the purpose of exercising municipal rights. But, when we consider that this notice has reference only to the right to the exercise of the parliamentary franchise, I think we cannot fairly understand it in any other sense than that which will make it a valid notice for that purpose. It was urged by Mr. Temple that this construction would impose upon the voter the necessity of making inquiry, in order to ascertain whether or not he was bound to defend his vote. That objection was pressed in Quigley's case, but the court attached no importance to it, and said that it was not unreasonable that the party should make some inquiry. If there were any ambiguity here, I think it would be putting the voter to no very unreasonable amount of trouble, to hold that he should have looked at the list of freemen entitled to vote for the city, to see if the objector's name was there. At the same time, I must say that I think no such inquiry would be necessary in this case; for, I think no person reading this in the fair and liberal spirit in which these notices should be read, could \*690] reasonably doubt that the \*objector meant to describe himself as being on that list. For these reasons, I think the notice was sufficient, and that the appeal against the decision of the revising-barrister should be disallowed.

MAULE, J.—I regret that I am unable to arrive at the conclusion at which the Lord Chief Justice has come. It appears to me that the notice of objection in this case is *not* sufficient. The 17th section of the 6 & 7 Vict. c. 18, confers the power of objecting to a voter's right to be upon the register, upon persons who are themselves upon the list of voters. It is upon such persons, and such only, that is conferred the right of putting a voter upon proof of his title to vote. This right is annexed, by force of the statute, not to persons to whom it is naturally incident, but to persons to whom the legislature has thought fit to give it. Such persons are by s. 17 required to give a notice in the form or to the effect pointed out in the schedule. The form of notice given in the schedule, after the name and place of abode of the objector, has these words,—“On the list of voters for the parish of ———.” These words show that the form is given merely by way of example,—to intimate that the party is to point out that he is on some list of voters for the city or borough, and to point out on what particular list. There is no controversy as to the form being applicable strictly to householder voters only, and not to freemen: it is admitted,—and in this I believe the whole court are agreed,—that the objector ought to declare himself to be upon the list of freemen voters for the city. The notice should have given an intimation that

the objector is upon the list of freemen entitled as such to vote in the election of members to serve in parliament. What the party does say, is, that he is on "the list of freemen for the city," not in terms \*that he is on the list of freemen entitled to vote for the city. [\*691 The question is, whether the notice does in substance and effect inform the person to whom it is addressed, that the person sending it is upon the list of freemen entitled to vote. Taken alone, and without any context or occasion to show to what it has reference,—which I conceive to be the proper way to read the notice,—it does not comprehend any assertion of the objector's being on the list of persons entitled as freemen to vote in the election of members for the city. But it is said, that, taking into consideration the surrounding circumstances, and taking into consideration the rule of construction afforded by the 101st section, the language here used,—“on the list of freemen for the city of Carlisle,” does contain implicitly an assertion that the objector is on the list of persons entitled to vote for the city, in respect of their being freemen thereof. That there *may* be a list of freemen who are not entitled to vote, is not, and cannot, be denied. The only question, then, is, are the grounds suggested for putting upon the words used a construction which does not properly belong to them, such as ought to be allowed to prevail? The revising-barrister seems to have relied a good deal upon certain particular facts and circumstances relating to the city, which he has set out,—that there are certain lists there made out intituled in the way he describes. But I do not think those circumstances can legitimately be taken into consideration, or, if they could, ought not I think to influence the decision to which he has come. There is nothing that is at all doubtful or ambiguous in the words which are used: they import a clear, plain, and intelligible assertion that the party is on the list of freemen for the city. Now, I do not think that those plain and unequivocal words can be construed to mean the list of freemen entitled to vote in the election of members \*for the city, [\*692 by reason of the existence of the extrinsic fact that there does exist a list containing some of the freemen only. If that rule of construction be carried out, it would in all cases restrain words, however general, to the particularity which might be necessary to suit the occasion. It seems to me that an occasion cannot be called in aid to restrict words which in themselves admit of no doubt in the mind of a person ordinarily versed in the English language. Reading this notice in a plain, common-sense way, no one could say that this person affects to describe himself as being on a list of voters for the city.

But it is said that the construction contended for on the part of the respondent, is aided by the 101st section, which provides “that no misnomer or inaccurate description of any person, place, or thing, named, or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise

prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood;" and that we must look at the matter as a man of plain common sense would look at it, and not technically or critically. Nobody suggests that the words used here are to be looked at technically. I do not regard them as words of art; but I take them at large, and without any rule of construction save such as any man of plain common sense would apply to them. As to dealing with them *critically*, that I think we are bound to do. Dealing with words critically, means, applying one's mental powers to them, in order to give them their proper signification. The Lord Chief Justice himself has been applying \*693] very acute powers of criticism, to \*show that the construction he puts upon this notice is the correct one. He says, in effect, that there is a certain section of the act of parliament which enables him to give the words used by the objector a sense which otherwise he could not give to them. I do not think that section enables us to give the words the sense he imputes to them. I apprehend that section to mean that, if a document such as is there referred to, contains a substantial statement of anything which it is required to contain, the circumstance of the language in which it is expressed not being perfectly apt and accurate, shall not be taken advantage of to defeat the intention of the party,—the inaccuracy may be got over, provided the thing may be commonly understood. Does that rule apply to the present case? Certainly not. There is no ambiguity, no obscurity, no difficulty in the language here used. The objector affirms that he is on the list of freemen for the city of Carlisle. There is nothing inaccurate in that. There may be, and in fact there is, such a list. The party may have some purpose in view in affirming that. But, whatever his object may be, that is what he says.

If the expression had been used upon an occasion when it would suffice to state that the party was on the list of freemen, but would not suffice to state that he was on the list of freemen entitled to vote in the election of members, nobody could doubt that it must mean the former and not the latter. I think the document must not be construed with relation to the occasion: if such is to be the rule of construction, it is difficult to say where it would stop. This is a notice given to a person who is on the list of voters. Then, it seems, people are to be taken to know that persons objecting must be on a list of freemen entitled to vote; and therefore, when a party says he is on \*694] the list of freemen, he is to be taken to \*mean that he is on the list of persons who, being freemen, are entitled to vote. I cannot think that that is the proper way to deal with the notice. The statute says that the person who has the right to object shall belong to a particular class, and that he shall affirm in his notice that he

belongs to that class. It is false criticism to say that you may restrict the meaning of words to the occasion. If that were so, I do not see why the notice should not simply say, "on the list." If the 101st section is to be prayed in aid, it would be enough, I suppose, to say, "on the list for the parish," or "of the parish." That would be altogether evading the positive exigency of the legislature, adopted, as I think, for very good reasons. If words be used on an occasion when they cannot have any meaning at all unless they are restricted to the occasion, then it may be lawful and proper so to restrict them. But there is no necessity for doing so here. Suppose this man had said, "I am an inhabitant of the city of Carlisle," could it be contended that he meant anything more or anything less? To say that you are to elect that which is not the plain natural construction of the words used, for the purpose of making a document operate in a particular way, is going much further than is warranted by any just rule of construction. No inconvenience or inconsistency can arise in the present case from giving to the words used their plain, natural, common-sense meaning. So construing them, they affirm of the objector that he is on the list of freemen for the city of Carlisle, not on the list of freemen entitled to vote in the election of members for the city; and that does not make that affirmation which is of the essence of the notice.

For these reasons I think the notice of objection was insufficient, and therefore that the decision of the revising-barrister was wrong.

\*WILLIAMS, J.—I concur with my Lord Chief Justice in thinking that the revising-barrister was right in holding this notice [\*695 of objection to be sufficient. Having regard to the subject-matter of the notice, and to the occasion of giving it, nobody could understand this description of the objector otherwise than as referring to the list of freemen of the city entitled to vote in the election of members for the city. It is a misdescription or inaccuracy which is cured by s. 101.

TALFOURD, J.—I agree with my Lord and my Brother Williams in thinking that the revising-barrister was right in holding this notice to be sufficient. It is not to be assumed that the objector is to state his title. The 17th section of the 6 & 7 Vict. c. 18, says he shall have the title, and shall give the notice. By giving the notice, he must be taken to affirm the fact that he is entitled to give notice. The notice in terms requires him to state the particular list within the ambit of the city or borough, in which his name is to be found. The form given in the schedule is not strictly applicable to the present case. If the objector was on a householders' list, he must describe himself as on the list for the particular parish. But, being on the list applicable to freemen voters, he cannot strictly comply with the form. He must, however, affirm that he is on some list of persons entitled to vote. If there had been no other list of freemen here than the list published by the town-clerk, of freemen entitled to vote in the election of members for the



city, there could have been no doubt. The ambiguity is introduced by the statement in the case that there is another list. If so, the case is similar to that of Lambert, app., The Overseers of St. Thomas, New Sarum, resp., antè, p. 642. The other list is found not to be commonly \*696] called the list of freemen, but "the freemen's roll," or "burgess-list." It seems to me that the words here, "on the list of freemen for the city of Carlisle," must be commonly understood to point to the list of persons entitled to vote as freemen of the city; and that, in construing the notice, we may fairly take into consideration the extrinsic circumstances which may assist us in arriving at the true meaning. It would be idle for the party on such an occasion to describe himself as on the municipal list only.

Decision affirmed, without costs.

END OF THE REGISTRATION CASES.

CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
IN  
Michaelmas Term,

IN THE  
SIXTEENTH YEAR OF THE REIGN OF QUEEN VICTORIA. 1852.

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The Judges who usually sat in banc in this Term were :

JERVIS, C. J.  
MAULE, J.

WILLIAMS, J.  
TALFOURD, J.

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ARNELL(a) v. THE LONDON AND NORTH-WESTERN  
RAILWAY COMPANY. Nov. 15.

By a local paving act, 41 G. 3, c. cxxxi. s. 37, the commissioners were to rate all "houses, shops, warehouses, coach-houses, stables, cellars, vaults, *buildings*, and tenements:" and s. 40 provided that the rates "upon or in respect of any chapel, meeting-house, hospital, school, or other *public building*, or any *wall*, garden, yard, or *void space of ground*, should be ascertained according to the number of square yards of pavement paved, &c., under the act belonging to such chapel, &c., measuring the same from such chapel, &c., to the middle of the street, &c., on which the same should respectively abut, &c.; but so, nevertheless, as that no rate or assessment should by virtue of that act be laid upon, or collected or received for or in respect of, any *wall*, garden, yard, or *void space of ground*, unless the space should *abut upon or front* some street, &c., to be paved."

The 26th section of the 43 G. 3, c. cxxxix., which was substituted for the 37th section of the former act, provided that the rates should be assessed "upon all and every person and persons who should inhabit, hold, occupy, &c., any house, &c., building, or tenement, in any of the said streets, &c., according to the yearly rent or value of such houses," &c.

And by the 30th section of the general metropolitan paving act, 57 G. 3, c. xxix., the commis-

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(a) The plaintiff was described as "clerk to the commissioners for executing the powers of certain acts of parliament made and passed in the 41st year of the reign of His late Majesty King George the Third, c. cxxxi., intituled 'An act for forming, paving, cleansing, lighting, watching, watering, and otherwise improving and keeping in repair the streets, squares, and other public passages and places which are and shall be made upon certain pieces or plots of

donors are to assess "any cathedral, collegiate, or other church or churches, parochial or other chapels, meeting-houses, places for religious worship, hospitals, public schools, and all other public buildings," &c., at a given rate for every square yard of the foot, carriageway, and other pavements contained in one-half of the entire width of the street, &c., as shall lay before or at the sides or rear of, or abut upon or adjoin to, such cathedral, collegiate, or other church or churches, &c., or before, upon, or to the areas or ground in front of, or surrounding, or belonging to the same, &c.; and also to rate and assess "all and every the churchyards, cemeteries, or other burying places, *dead walls*, and *void spaces of ground*, within such parochial or other district, and which are not charged to, such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant, at a rate not exceeding 1s. for every square yard of the foot and carriageway and other pavements contained in one-half of the entire width of as much of any and every such street or public place as shall or may lay before or at the sides or rear of, or abut upon or adjoin to, such churchyards, cemeteries, or other burying places, *dead walls*, and *void spaces of ground*," &c.

The London and Birmingham Railway Company, by one of their acts (5 & 6 W. 4, c. lvi., s. 55), were required to build, and for ever thereafter keep in repair, a bridge over their railway, with a brick wall at each side thereof, at a spot where their railway intersected a public street or road which was paved and repaired under the local acts. The land upon which that part of the railway was constructed, and the bridge erected, was conveyed to the company in fee by the former owner, with a reservation of "the use and enjoyment of the bridge." The surface of the bridge was paved by the local commissioners:—

Held, that the company were liable to be assessed under the above acts; for, that, although the bridge was not a "public building," within the meaning of the 57 G. 3, c. xxix., s. 30, the company were rateable in respect of the *side walls*, under the description of "*dead walls*," or, —per Jervis, C. J.—as the owners and occupiers of "*void spaces of ground*" abutting on the road.

And, *semble*, per Maule, J., and Talfourd, J., that the *fence-walls* came within the description of "public buildings" in the 57 G. 3, c. xxix., s. 30, being erected under the provisions of an act of parliament, and for the benefit of the public.

THIS was an action of debt tried at the sittings in Middlesex after Michaelmas Term, 1848, when a verdict, \*by consent, was found \*698] for the plaintiff, for 79*l.* 14*s.* 10*d.* debt, and 1*s.* damages, subject to the opinion of the court on the following case:—

\*The plaintiff is the clerk to the commissioners of the Southampton paving trust, who are appointed under the authority of, and for the purpose of carrying into execution, the several paving and lighting acts, commonly called the Southampton paving-acts, St. Pancras, and the Metropolitan paving-act, and who, acting under them, sues as nominal plaintiff under the authority of the said acts,—which acts were to be referred to as part of the case. \*699]

The defendants are The London and North-Western Railway Com-

ground in the parish of St. Pancras, in the county of Middlesex, belonging to the Right Hon. Ann, Dowager Baroness Southampton,' and in the 43d year of the reign of His said late Majesty King George the Third, c. cxxxix., intituled 'An act to enlarge the powers of, and explain and amend, an act made in the 41st year of the reign of His then present Majesty, intituled, &c., and for including therein certain other small plots of ground in the said parish therein described,' and in the 52d year of the reign of His said late Majesty King George the Third, c. lxxiv., intituled 'An act for altering and enlarging the powers of two acts of His then present Majesty, for paving, repairing, cleansing, lighting, watering, and watching such part of the parish of St. Pancras, in the county of Middlesex, as lies on the west side of Tottenham Court Road,' and in the 55th year of the reign of His said late Majesty, King George the Third, c. xxv., intituled 'An act for amending two acts of His then present Majesty, for improving certain plots of ground belonging to the Right Hon. Ann, Dowager Baroness Southampton, and other persons, in the parish of St. Pancras, in the county of Middlesex,' and in the 4th and 5th years of the reign of Her present Majesty, Queen Victoria, c. lxx., intituled 'An act to alter, amend, and enlarge some of the powers and provisions of the acts for paving and otherwise improving certain streets in the parish of St. Pancras, in the county of Middlesex.'"

pany, who are incorporated by the 9 & 10 Vict. c. cciv., which, together with the former acts relating to the London and Birmingham Railway Company, were also to be referred to as part of the case.

The action was brought to recover the amount of nine several rates made by the commissioners. The first seven of these rates were made upon the London and Birmingham Railway Company, who, the commissioners alleged, were, at the time of the making of those rates, owners of the property in respect of which the rates were imposed. Between the time of the making of the seventh and the time of making the eighth rate, the last-mentioned company was amalgamated by act of parliament with the Grand Junction Railway Company and the Manchester and Birmingham Railway Company; and the three were dissolved, and incorporated \*by the name of the London and North-Western Railway Company, who are the defendants in this [\*700 action. By the act consolidating the companies (9 & 10 Vict. c. cciv.), it was enacted that all moneys which, before the passing of the act, were due and owing by, or recoverable from, either of the dissolved companies, should be paid by the company thereby incorporated,—s. 1.

The declaration contained nine counts, being for the nine several rates for which the plaintiff, as clerk to the said commissioners, sued. The first and second counts respectively stated that the company were indebted to the plaintiff in 14*l.* 9*s.* 11*d.* for a rate made by the commissioners under the authority of the acts of parliament before referred to. The remaining seven stated the amount due for the rate respectively at 7*l.* 5*s.* Each count was for a distinct rate imposed upon the company,—the first two for the period of a year, the remaining seven for the period of half a year.

The defendants pleaded never indebted; upon which issue was joined.

The rates declared on extended from the 24th of June, 1842, to the 1st of January, 1848, and were made at the rate of 7*d.* per square yard upon 213 square yards of the foot and carriageway pavement contained in the whole of the surface of the Crescent Place Bridge, and upon 284 square yards of the foot and carriage pavement contained in the whole of the surface of the Stanhope Place Bridge, hereinafter mentioned.

The following are extracts from one of the rates, and which were to be taken as applicable to the others:—

"The London and Birmingham Railway Company, for Crescent Place Bridge (and dead walls).

Current Rate.  
£ s. d.

"For 213 square yards of the pavement of the foot and carriageways, at 3½*d.* per square yard,—to be paid by the London and Birmingham Railway Company . . . 3 2 2

\*"Ditto, for Stanhope Place Bridge (and dead walls).

\*701] "For 284 square yards of the pavement of the foot and carriageways, at 3½*d.* per square yard,—to be paid by the London and Birmingham Railway Company . . . 4 2 10"

The words "and dead walls" were not inserted in the rates until the 1st of July, 1846.

The regulations contained in the general acts of parliament relating to the making of the rates, were duly complied with. The buildings in respect of which the rates the subject of this action are imposed, are two bridges, which are not charged to the rates in respect of any messuage, house, or other building to which they may be appurtenant, called respectively Crescent Place Bridge and Stanhope Place Bridge, which were built by the railway company, extending over and across the line of their railway, in pursuance of the 55th section of the 5 & 6 W. 4, c. lvi., which enacts "that the said company shall, at their like costs, within the period last aforesaid (two years, s. 54), make, and for ever thereafter keep in 'repair,' a brick bridge of 80 feet wide, over the line of the intended railway, in Crescent Place, with proper slopes, with a brick wall, coped with stone, at each end thereof at the height of six feet; and also at their like costs and charges, within the time last aforesaid, erect, and for ever thereafter keep in repair, a substantial brick wall of the height of six feet, connecting each side of the said bridge with the crown land; and also, at their like costs and charges, within the time last aforesaid, make, and for ever thereafter keep in repair, a covered line or tunnel, with proper slopes, to and over the same, from the south-west corner of Stanhope Place, continuing over the railway across Stanhope Street, in a north-westerly direction 240 feet, leaving the line of Stanhope Street uninterrupted, with an easy access to Stanhope Place, each side of such bridge to be defended with a brick wall \*702] \*coped with stone, of the height of six feet at the least."

The Crescent Place Bridge was accordingly erected in pursuance of the above section; but instead of the tunnel therein mentioned, the Stanhope Place Bridge (the other bridge in question) was erected by the company. The directions of the act were in all other respects complied with. The bridges are locally within the jurisdiction of the paving commissioners.

The ground under the two bridges in question, at the time of the making of these rates, formed, and still forms, part of the main line of the defendants' railway, communicating with the Euston Station; and such ground over which the bridges are constructed, was purchased, with the ground, by the London and Birmingham Railway Company, from Lord Southampton and others, and was conveyed to them by deed of the 4th of January, 1839, in fee. The use and enjoyment of the said two bridges was reserved out of the said conveyance.(a) [A

(a) The reservation was as follows:—"Except and always reserved out of the conveyance hereby made the free and uninterrupted use and enjoyment, for garden or nursery ground, or public or private roads or ways, or any other purpose not prohibited by either of the said acts of parliament (the London and Birmingham Railway Company's Acts, 3 & 4 W. 4. c. xxxvi., and 5 & 6 W. 4, c. lvi.), of all the ground above the tunnel or covered way forming part of the said railway, as shown on the plan annexed, and therein marked with the letter A., and of all the

\*copy of the conveyance from Lord Southampton to the company, accompanied, and was to be referred to as part of, the case.] [\*708]

Both the bridges form part of the public highway, being regular thoroughfares for carts, carriages, and foot-passengers, connecting several public streets and roads on each side of the railway in the locality in which they are situate, and carry and continue the same public highways across the said railway of the defendants; and the same bridges are not used in any way or for any purpose except as such parts of the public highway; and the same bridges have ever since their erection been paved, cleansed, lighted, and watered by the said commissioners, in like manner as the other public streets and places within the jurisdiction of the said commissioners. The watching is under the authority of the commissioners of police.

By the 43 G. 3, c. cxxxix., s. 26 (one of the local acts under which the commissioners are appointed), it is provided, that, for the purposes of the act, the commissioners may make, lay, and assess rates "upon all and every person and persons who shall inhabit, hold, use, occupy, possess, or enjoy, any house, shop, warehouse, coach-house, stable, cellar, vault, *building*, or tenement in any of the said streets, squares, and other public passages and places."

This section was substituted for the 37th section of the 41 G. 3, c. cxxxi., which had empowered the commissioners to lay a rate upon all houses, shops, warehouses, coach-houses, stables, cellars, vaults, *buildings*, and tenements, in any of the said streets, squares, and public passages and places.

By the 40th section of the last-mentioned act, it was provided as follows:—"Provided always, and be it further enacted, that the rates or assessments to be made and laid by virtue of this act upon or in respect \*of any chapel, meeting-house, hospital, school, or other *public building*, or any *wall*, garden, or *void space of ground*, shall be ascertained according to the number of square yards of pavement paved or repaired, cleansed, lighted, watched, or watered under or by virtue of this act, belonging to such chapel, meeting-house, hospital, school, or other *public building*, *wall*, garden, yard, or *void space of ground*, measuring the same from such chapel, meeting-house, hospital, school, *building*, *wall*, garden, yard, or *void space of ground*, to the middle of the street, square, or place on which the same shall

ground above the tunnel or covered way forming part of the said railway, as shown on the said plan, and thereon marked with the letter B.; the said company and their successors, and their agents and workmen, being at all times at liberty to enter on the same excepted premises for the purpose of doing or executing any repairs that may be necessary to the said tunnels or covered ways respectively, and doing no unnecessary damage thereby, and always well and effectually making good all damage occasioned thereby; and also except and always reserved out of the said conveyance hereby made, the use and enjoyment of the bridges shown on the said plan."

respectively abut; and the same shall never exceed in any one year the sum of 6d. for every such square yard: and such rates or assessments to be made and laid upon such chapel, meeting-house, hospital, school, or other public building, wall, garden, yard, or void space of ground, shall be paid by the chapelwardens, trustees, or owners or proprietors thereof respectively; but so, nevertheless, as that no rate or assessment shall by virtue of this act be laid upon or collected or received for or in respect of any *wall, garden, yard, or void space of ground, unless the same shall abut upon or front some street, lane, or place to be paved, cleansed, or lighted as aforesaid.*" This last section is not repealed by the 48 G. 3, c. cxxxix.

By the 57 G. 3, c. xxix., s. 30, it is enacted "That it may be lawful to and for the commissioners, trustees, or other persons having the control of the pavements of the streets or public places in any parochial or other district within the jurisdiction of this act, to include in any rate or assessment for or towards the costs and charges of paving or repairing the pavement of and within such parochial or other district, either jointly or separately with any other subjects or purposes to be hereafter made by virtue of the respective local act or acts relating to the pavements of \*705] such parochial or other \*district, or to such pavements and other objects, or by virtue of this act, and from time to time rate and assess thereby any cathedral, collegiate, or other church or churches, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and all other *public buildings* within each of such parochial or other districts, which now is, or hereafter may be built, and all other place or places which by any local act or acts of parliament relating to any particular parochial or other district may be, or are, or is, liable to be rated or assessed for those purposes, or any of them, at a rate not exceeding in any one year the sum of 1s. for every square yard of the foot, carriageway, and other pavements contained in one-half of the entire width of as much of any and every street or public place as shall or may lay before or at the sides or rear of, or abut upon, or adjoin to, such cathedral, collegiate, or other church or churches, parochial and other chapel, meeting-houses, places for religious worship, hospitals, public schools, and other *public buildings* or place or places respectively, or before, upon, or to the areas or ground in front of, or surrounding, or belonging to the same, or any part or parts thereof, or the entrance to the same: and also to rate and assess thereby all and every the churchyards, cemeteries, or other burying places, *dead walls, and void spaces of ground*, within such parochial or other district, and which are not charged to such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant, at a rate not exceeding in any one year the sum of 1s. for every square yard of the foot and carriageway and other pavements contained in one-half of the entire width of as much of every

and any such street or public place as shall or may lay before or at the sides or rear of, or abut upon, or adjoin to, such churchyard and cemeteries, or other burying places, *dead walls, and void \*spaces of ground*, or any part or parts thereof; and that every of the [\*706 said rates or assessments so made from time to time shall be paid for such cathedral, collegiate, or other churches, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and other *public buildings*, churchyards, cemetery, or other burying places, *dead walls, and void spaces of ground*, by the persons following, that is to say,—the rates or assessments of and for any cathedral or collegiate church by the dean and chapter thereof, and of and for any other churches or parochial chapels, and churchyards and parochial cemeteries, by the churchwardens or chapelwardens thereof respectively for the time being, and the rates or assessments of or for any hospitals, by the stewards or housekeepers of such hospitals for the time being, and the rates or assessments of or for any public schools, by the masters or mistresses of such public schools for the time being, and the rates or assessments of and for any sessions houses, or gaols, or courts of justice, by the clerk or clerks of the peace for the city, borough, or county for the time being, and the rates or assessments of and for any other *public buildings*, by the housekeeper or other keepers, or other person or persons having the care of such other public buildings as aforesaid for the time being; and that such rates or assessments of and for any other cemeteries or burial places, not being parochial, shall be paid by the owners or proprietors thereof respectively, or by the persons who for the time being should receive the money which shall be paid for the interment of the dead therein; and such rates or assessments of and for any other chapels or meeting-houses and places for religious worship, not being parochial, shall be paid by the owner or owners, proprietor or proprietors, occupier or occupiers thereof respectively, or any person or persons who shall receive or collect any money for the seats or pews \*therein, or [\*707 any other money arising therefrom; and such rates or assessments of and for such *dead walls, or void spaces of ground* shall be paid by the owner or owners, proprietor or proprietors, occupier or occupiers thereof respectively, or the person or persons claiming to be the owner or owners, proprietor or proprietors of any void spaces of ground, when there shall be no actual occupier or occupiers thereof respectively, as the commissioners or trustees, or other persons having the control of the pavements in any such parochial or other district shall from time to time direct; and that all and every such persons respectively shall be charged with, and shall pay, such sum of money as shall from time to time be rated, assessed, or imposed on or in respect of or for the said premises respectively: and the rates or assessments for any other place or places which by any such local act or acts as aforesaid



may be, or is, or are, liable to be rated and assessed, shall be paid by such person or persons, officer or officers, as by the same local act or acts are directed to pay the rates thereby authorized to be made and assessed; and that the same rates and assessments may be recovered from all and every such persons respectively, and be applied, in such manner as other rates and assessments made for and towards the expenses of paving and repairing the pavements, either separately or jointly with any other objects and purposes, are directed to be recovered and applied by any local act or acts relating to the pavements, and other objects and purposes of such parochial or other district, or in and by this act."

By the 55 G. 3, c. xxv. s. 3,—one of the local acts,—it is provided, that, if the said commissioners, upon view of any street, square, or other public passage or place within the limits of the act, which should be built upon or in building, should be of opinion that the foot and carriageways of the same, or any part or parts thereof, \*were fit  
\*708] and proper to be levelled or filled in and paved, they should and might order their surveyors "to give notice to the owner or owners, proprietor or proprietors, lessee or lessees of any such land, ground, house, shop, and warehouse, coach-house, stable, cellar, vault, tenement, or hereditaments, situate in any such street, square, or other passage or place, or leave the same at his, her, or their last usual place of abode, or with his, her, or their known servant or servants; which notice shall require such owner or owners, proprietor or proprietors, lessee or lessees, to meet the said commissioners at the time and place to be therein mentioned, to compound for levelling and filling in such foot and carriageways, and paving thereof, at any sum not exceeding 1s. for every cubical yard of such ground so to be levelled and filled in, nor 8s. for every square yard of such pavement, whether carriageway or footway; and, if such owner or owners, proprietor or proprietors, lessee or lessees, shall not attend, or shall not compound or agree with the said commissioners as aforesaid, it shall and may be lawful for the respective inhabitant or inhabitants, occupier or occupiers, of the said premises, to compound and agree with the said commissioners for such levelling, filling in, and paving, and to pay to the said commissioners the composition moneys that shall be so agreed on, which composition moneys every such inhabitant or occupier shall and may, and is hereby authorized to deduct and retain out of his or her rent; and the said owner or owners, proprietor or proprietors, lessee or lessees of such premises, is and are hereby required to allow such deduction: Provided always, that nothing in this act contained shall be construed, deemed, or taken to impeach, alter, or make void any agreement made or to be made between landlord and tenant, or any demise or lease, or agreement for the same; and, in case the said owner or owners, proprietor or pro-

prietors, lessee or \*lessees, or the said inhabitant or inhabitants, occupier or occupiers, shall not compound or agree with the said [\*709 commissioners as aforesaid, then it shall and may be lawful to and for the said commissioners to order the said foot and carriageways to be levelled and filled in, and to be paved, as soon as conveniently may be; and all the charges and expenses attending such levelling, filling in, and paving, shall be paid by the respective owner or owners, proprietor or proprietors, lessee or lessees, and shall be recovered and levied by distress and sale of their goods and chattels, in the same manner as the rates or assessments to be laid by virtue of the said recited acts, or either of them, are or is therein made recoverable."

The commissioners of the Southampton paving-trust, proceeding under the last-mentioned section of the 55 G. 3, c. xxv., appointed a committee to view and inspect the said two bridges in Crescent Place and Stanhope Place, who, on the 1st of October, 1841, proceeded to the same, and were of opinion that the foot and carriageways upon the bridges ought to be paved, and directed the following notices required by the act to be served upon The London and Birmingham Railway Company:—

"No. 1586.

"To J. Creed, Esq., London and Birmingham Railway Company.

"I do hereby give you notice and require you to meet the said commissioners, in the board-room, Edward Street, Hampstead Road, in the said parish, on Wednesday, the 18th of October, 1841, at 7 o'clock in the evening precisely, to compound and agree for the levelling and filling in and paving the foot and carriageway belonging to your premises in Crescent Place, as the lessee or owner, being the roadway upon the bridge in the said place, according to the directions of the said act of the 55th year of the said reign. And take further \*notice, [\*710 that, by the said last-mentioned act, it is declared, in the case of your not attending or compounding and agreeing as above required, that it shall be lawful for the inhabitant or occupier of the said premises to compound and agree with the said commissioners for such levelling and filling in and paving; which composition-moneys such inhabitant or occupier is thereby authorized to deduct and retain out of his or her rent, and you, as the owner of the premises, are required to allow such deduction, provided there be not any agreement between you and the tenant to the contrary. And I have further to inform you, that, in case of your not attending, or compounding and agreeing, as above required, or of your tenant not doing it, as the said last-mentioned act empowers, you will be liable and required to pay the whole charges and expenses attending such levelling, filling in, and paving, agreeably to the directions of that act. Dated this 6th of October, 1841.

J. W. WILKINS, Surveyor.

"The following is your account of the composition that will be required by the commissioners:—

						£	s.	d.
" 85	yds.	3	ft.	superficial	Yorkshire	footway	paving	at 5s. 6d.
" 21	"	3	"	do.	granite	channel	at 8s.	
" 92	"	4	"	do.	macadamised	at 4s.		
" 42	"	2	"	run	granite	kerb	at 5s.	
							261	3
							2	8

The other notice, No. 1585, was similar in form to the above, and relating to the bridge in Stanhope Place. The amount of composition demanded in this case was 76*l.* 8*s.* 10*d.*

Mr. George Donaldson, acting on behalf of the railway company, accordingly attended the meeting of the commissioners at their board-room on the 13th of October, 1841, in obedience to the above summonses, \*711] and then, on behalf of the company, agreed to pay the \*composition demanded in the said notices, and at the same time signed a memorandum at the foot of each notice, in the following words:—"I consent to the above composition, on behalf of The London and Birmingham Railway Company. G. DONALDSON."

In the minute-book of the commissioners, under date the 13th of October, 1841, is the following entry:—"Mr. George Donaldson, of The London and Birmingham Railway Company, being in attendance on behalf of the company on composition notices 1585 and 1586, agreed to the said composition charges."

These two sums of 61*l.* 3*s.* 2*d.* and 76*l.* 8*s.* 10*d.* so agreed to be paid as composition, were accordingly, on the 7th of January, 1842, paid by the London and Birmingham Railway Company, to the commissioners; and the said commissioners thereupon levelled, filled in, and paved the footway and carriageways of the said two bridges.

There is a small slip of enclosed ground a few feet in width, running by the side of the railway, up to the footpath of the roadway which communicates with Crescent Place Bridge, and which piece of ground fronts to and adjoins the footpath of that roadway; and for this piece of ground the company pay paving-rate to the commissioners. This slip of land forms part of a garden attached to a house now belonging to the company, and in the occupation of Mr. Robert Savil as their tenant. The company have been assessed for, and have continued to pay, the paying-rate assessed.

The company have always kept the said bridges in repair, and done what was necessary for the convenience and safety of the public in using the same bridges, in that respect, as required by the act of parliament.

In the year 1845, in consequence of children running on the top of the parapet-walls of the said bridges, and of a child having fallen from \*712] the same on to the railway, \*the said company put iron spikes on the parapet-walls of the two bridges in question, so as to increase the height and efficiency of the side fence-walls of the said

bridges. They also, in the year 1845, repaired the brick-work of the Crescent Place bridge, which had been damaged by the carelessness of the driver of one of their own carriages which was passing over it. Damage was by the same means on that occasion done to the foot-pavement which had been made by the commissioners on that bridge for the company, and paid for by the company as aforesaid; and the expense of repairing such pavement was repaid by the company to the commissioners.

The question for the opinion of the court, is, whether the company were liable to be rated in respect of the bridges in question, or either of them, under the clauses of the acts of parliament, or any or either of them, which authorize a rate upon or in respect of *public buildings, dead walls, or void spaces of ground*. If they were, the verdict is to stand for such sum as the court shall direct. If they were not liable, a nonsuit is to be entered.

*Byles*, Serjt. (with whom was *Barstow*), for the plaintiff.—The questions are, whether the two bridges mentioned in the case are rateable under the local paving acts, 41 G. 3, c. cxxxi., and 48 G. 3, c. cxxxix., or under the general metropolitan paving act, 57 G. 3, c. xxix. The 37th section of the 41 G. 3, c. cxxxi., enabled the commissioners to rate all “houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings, and tenements;” and s. 40 provides “that the rates or assessments to be made and laid by virtue of this act upon or in respect of any chapel, meeting-house, hospital, school, or other *public building*, or any *wall*, garden, yard, or *void space of ground*, shall be ascertained according to the number of square yards of pavement paved or repaired, &c., \*under or by virtue of this act, belonging to such chapel, &c., measuring the same from such chapel, &c., to the middle of [\*713 the street, &c., on which the same shall respectively abut, &c.; but so, nevertheless, as that no rate or assessment shall by virtue of this act be laid upon, or collected or received for or in respect of any *wall*, garden, yard, or *void space of ground*, unless the same shall *abut upon* or front some street, lane, or place to be paved,” &c. The 25th section of the 48 G. 3, c. cxxxix., repeals the 37th section of the former act; and the 26th section enacts that the rates shall be laid and assessed “upon all and every person and persons who shall inhabit, hold, use, occupy, possess, or enjoy, any house, shop, warehouse, coach-house, stable, cellar, vault, building, or tenement, in any of the said streets, &c., according to the yearly rent or value of such houses,” &c. The 188th section of the general act, 57 G. 3, c. xxix., enables local commissioners to act upon their local acts, or upon that act, as they may deem expedient. The material section of the general act is the 30th, which enables the commissioners to rate and assess “any cathedral, collegiate, or other church or churches, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public-schools, and all other *public*

*buildings*, and all other place or places which by any local act or acts of parliament relating to any particular parochial or other district may be or are or is liable to be rated or assessed, &c., at a rate not exceeding in any one year the sum of 1s. for every square yard of the foot, carriageway, and other pavements contained in one-half of the entire width of as much of any and every street or public place as shall or may lay before or at the sides or rear of, or abut upon or adjoin to such cathedral, collegiate, or other church or churches, &c., or before, upon, or to the areas or ground in front of, or surrounding, or belonging to \*714] the same, or any part or parts thereof, or \*the entrance to the same; and also to rate and assess thereby all and every the churchyards, cemeteries, or other burying-places, *dead walls*, and *void spaces of ground*, within such parochial or other district, and which are not charged to such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant, at a rate not exceeding in any one year the sum of 1s. for every square yard of the foot and carriageway and other pavements contained in one-half of the entire width of as much of any and every such street or public place as shall or may lay before or at the sides or rear of, or abut upon or adjoin to such churchyards, cemeteries, or other burying-places, *dead walls*, and *void spaces of ground*, or any part or parts thereof;" "and such rates or assessments of and for such *dead walls* or *void spaces of ground* shall be paid by the owner or owners, proprietor or proprietors, occupier or occupiers thereof respectively, or the person or persons claiming to be the owner or owners, proprietor or proprietors of any *void spaces of ground*, when there shall be no actual occupier or occupiers thereof respectively, or the commissioners or trustees, or other persons having the control of the pavements in any such parochial or other district, shall from time to time direct." Thus stood the power of rating in the district in question before the London and Birmingham Railway Company came into existence. By the 55th section of the 5 & 6 W. 4, c. lvi., the company are required, at their own expense, to "make and for ever thereafter keep in repair a brick bridge of thirty feet wide over the line of the intended railway in Crescent Place, with proper slopes, with a brick wall, coped with stone, at each end thereof, at the height of six feet; and also, at their like costs, erect, and for ever thereafter keep in repair, a covered line or tunnel, with proper slopes to and over the same, from the south-west corner of Stanhope \*715] Place, \*continuing over the railway across Stanhope Street in a north-westerly direction 240 feet, leaving the line of Stanhope Street uninterrupted, with an easy access to Stanhope Place, each side of such bridge to be defended with a brick wall, coped with stone, of the height of six feet at the least." These bridges were accordingly built; and afterwards, viz. in 1839, the company obtained from Lord Southampton a conveyance in fee of the land upon which this portion

of the railway and these bridges were built, "excepting and always reserved out of the conveyance hereby made, *the use and enjoyment* of the bridges" now under consideration; that is, the use of the roadway over them. That the bridges are the property of the company is clear: the case sets out acts of ownership over them exercised by the company, and acts amounting to admissions that they are their property. Then these bridges are rateable either as *public buildings*, *dead walls*, or *void spaces of ground*,—it is immaterial which. The company are liable to indictment if they suffer the walls of the bridges to decay. [JERVIS, C. J.—Suppose, instead of a wall, there had been an iron railing on each side?] In that case, the company would be rateable in respect of a "public building" or a "void space of ground." It is not the thing which is paved or repaired by the parish, that is rated; it is the thing which abuts or is at the side of it. If not rateable as bridges, these buildings are clearly rateable as dead walls,—that is, walls without openings therein for doors or windows.

*Channell*, Serjt. (with whom was *Bovill*), contra.—The material enactments to be considered are the 41 G. 3, c. cxxxi., s. 40, and the 57 G. 3, c. xxix., s. 30. These bridges are not "public buildings" ejusdem generis with those before mentioned in s. 30. By their act, the company are bound to build and keep in repair these bridges \*for the convenience of the public; they themselves having no use or enjoyment of them. [MAULE, J.—They enjoy them, by [\*716 the prevention of an impediment to their use of the railway: the bridges are a necessary part of a great work which tends to the profit of the company.] The section evidently intends some building which is susceptible of occupation in some way. The subsequent part of the section throws light upon what is meant by "public buildings;" the assessment is to be according to the number of square yards of the street or place upon which the building abuts: now, the "bridge" nowhere abuts upon any street or place. [MAULE, J.—If any other person was liable in respect of the walls, the company clearly would not be liable in respect of the surface of the bridges. The framers of the act intended to charge all buildings and all spaces abutting on the road. The company would not be rateable in respect of the *bridges* as public buildings.] Then, can the side walls be said to be public buildings within the act? [MAULE, J.—The wall is built for the benefit and the protection of the public. Why is it not a "public building?" JERVIS, C. J.—Suppose, instead of a railway, the space of ground on the other side of the wall was a private excavation, could it then be called a "public building?"] It is submitted that these are neither "public buildings," nor "dead walls," nor is the railway a "void space of ground," within the meaning of the statutes. [JERVIS, C. J.—The 30th section evidently intended to comprehend everything abutting on the road for the whole line of frontage. After enumerating the

various descriptions of property to be charged, the legislature use the words "dead walls and void spaces of ground," to denote every species of property not otherwise charged.] What property do these defendants possess which abuts upon the road? [JERVIS, C. J.—The walls; or, they being removed, the railway.] The acts of parliament con-  
 \*717] template that the \*land adjoining the road which is to bear the charge may be benefited by the paving. In what respect can this railway be benefited by the improvement of the road which crosses it? [MAULE, J.—Why should railway proprietors be the only persons having property at the side of the road who are exempted from the rate?]

*Byles*, Serjt., in reply, was stopped by the Court.

JERVIS, C. J.—It seems to be agreed that these bridges are not, within the first branch of the question, "public buildings," so as to make them rateable as such under the 57 G. 3, c. xxix., s. 30. They are not, I think, of the nature of public buildings contemplated by that section. I should, however, if it were necessary, be inclined to hold that the company are rateable in respect of "void spaces of ground,"—the object and intention of the act being that all property abutting on the road should contribute to the expense of putting and keeping it in a condition convenient for all. It is plain that the legislature intended that every description of property should be charged. The 26th section of the 43 G. 3, c. cxxxix., imposes the rate upon houses, shops, and other private buildings, in respect of the annual value. Then, the 30th section of the general act imposes it by frontage upon churches, chapels, and other public buildings, churchyards, dead walls, and void spaces of ground,—clearly showing that it was intended to include everything not otherwise charged. I think, therefore, we might fairly hold the company liable in respect of the "void spaces of ground" on either side of these bridges. But unquestionably there is a "dead wall;" and it is built on the land of the company on each side of the bridge which is paved by the commissioners, and in respect of which the company as the owners or occu-  
 \*718] piers of the land are assessed. This construction effectuates \*the intention and satisfies the words of the act of parliament.

MAULE, J.—This is a very plain case. The local as well as the general act clearly intended,—and it is just that they should do so,—that an improved road for the benefit of all persons having property in the neighbourhood should be paid for by those whose houses or land abut upon the road on either side; and that some person should be rateable for every inch of it, either in respect of annual value or space abutted on. There is, it is true, no recital in words that such was the intention of the legislature; but it is abundantly manifest from the whole scope of the acts, though we can only give it effect so far as we find apt words for the purpose. The provision as to "dead walls" seems to me to apply literally and aptly to this case. The acts impose the rate on the

owners of dead walls. That expression must, looking at the general scope and intention of the acts, have some meaning given to it. Where a wall is without any house or building behind it, and is merely intended to fence off or separate the road from the space of ground by the side of it, having no windows or doors, that I think is a "dead wall" within the meaning of the act,—within the literal meaning of the act. I do not know why, if it were necessary, a wall like this should not be held to be a "public building," within the 57 G. 3, c. xxix., s. 30, seeing that it is built by force and under the direction of an act of parliament, and is manifestly for the convenience and safety of the public. But, at all events, it is most clearly a "dead wall;" and therefore the company are not to stand in the singular and anomalous position of escaping a rate which is thrown upon everybody else who is benefited, probably to no greater an extent than themselves, by the improvement of the road.

\*WILLIAMS, J.—I am also of opinion that the company are liable to be assessed to the paving-rate in respect of these bridges. [\*719 The first question is, whether they are the owners or proprietors of the walls. Considering that they were erected under a liability imposed upon the company by their act of parliament, and that the company are bound to repair them, they clearly must be held to be the owners and proprietors within the meaning of the local and general paving-acts. The next question is, whether they are rateable as "public buildings," or "dead walls," or "void spaces of ground." It is quite manifest that the legislature intended that every sort of property which is adjacent to the road should contribute to the repairs by rate. Nevertheless, it might have so happened that the language of the act did not embrace property like that now in question. It might have been *casus omissus*: and I so thought for some time: but I am now satisfied that it is rateable under the name of "dead walls."

TALFOURD, J.—I also am of opinion that the property in question was rateable under these acts of parliament. If it were necessary to do so, I should not have much difficulty in arriving at the conclusion that the walls of these bridges come within the description of "public buildings," in the 57 G. 3, c. xxix., s. 30. It is enough, however, to say that they are clearly rateable as "dead walls." They are walls, the property of the company, which the company were bound by their act to erect and to keep in repair: and, according to the principle laid down by this court in *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), they are walls which are erected for the protection and benefit of the company as well as those of the public.

Judgment for the plaintiff.



\*720] \*BARRINGER v. HANDLEY. Nov. 16.

An order that the plaintiff be at liberty to proceed upon a quasi service of the writ of summons, under the 15 & 16 Vict. c. 76, s. 17, which is given in lieu of the old proceeding by *distringas* to compel appearance,—is absolute in the first instance, except under special circumstances.

THE 17th section of the common law procedure act, 15 & 16 Vict. c. 76, enacts that “the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and, in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit.”

*Prentice* moved for an order, under the above section, to enable the plaintiff to proceed against the defendant as if personal service of the writ of summons had been effected. The affidavit upon which he moved, stated that the clerk who attempted to serve the writ attended on the 29th of October last for that purpose at No. 97, High Street, Whitechapel, in the county of Middlesex, the address of the defendant as given by him to the plaintiff's attorney; but that, on inquiring for the defendant there, the deponent was informed that the defendant only called there for letters, and did not carry on business there; that, after making further inquiries respecting the defendant, the deponent found that he had no regular house of business in London, but that he conducted and carried on his business of a provision merchant at a place  
 \*721] called “The Provision Merchants’ \*Subscription Rooms,” in Tooley Street, Southwark; that the deponent thereupon, on the 30th of October, went to the said subscription-rooms, but, after waiting for him for about twenty minutes, was unable to meet with the defendant there; that the deponent went to the said subscription-rooms on several occasions afterwards, for the like purpose of serving the defendant, but was never able to meet with him there; that the deponent, on the 4th of November instant, enclosed a true copy of the writ, with the memorandum subscribed thereto, and the endorsements thereon, in an envelope, and directed the same to the defendant, and left it with a shopman belonging to the shop at No. 97, High Street, Whitechapel, requesting him to give it to the defendant when he called; that, on the following day, the deponent went again to the said shop, and there saw the same shopman, who informed the deponent (and which information the deponent believed to be true) that he had given the defendant the said envelope with its enclosure; that, on the 8th of November, a

person who styled himself clerk to the defendant's attorney, called at the office of the plaintiff's attorney with the copy of the writ enclosed in the envelope by the deponent to the defendant in his hand, and admitted the service of the writ on the defendant, and offered terms of settlement of the action; that the deponent had done all he possibly could to serve the defendant personally with a copy of the writ, but had not been able to do so, and, for the reasons aforesaid, verily believed that the writ had come to the knowledge of the defendant; that the deponent, on the 15th instant, searched at the proper office, and that no appearance had been entered by the defendant. [JERVIS, C. J.—Do you ask for a rule to show cause, or for an order absolute in the first instance?] This being a proceeding in substitution for the *distringas* to compel appearance, there can be no reason why it should not be absolute in the first instance. [TALFOURD, J.—These orders are always \*made ex parte at chambers. The Master stated that [\*722 Cresswell, J., had repeatedly made such orders without a previous summons. JERVIS, C. J.—It is desirable that the practice upon this subject be uniform. I will, therefore, speak to the judges in the next court.]

JERVIS, C. J., now said.—I have seen the Lord Chief Baron and my Brother Parke; and the result is, that we all think, that, in a case where the matter is plain, as it is here, the order should be absolute in the first instance. There may be cases where the court would not be justified in allowing the plaintiff to proceed as upon a personal service, but still where there is enough to call upon the defendant to show cause why the order should not be made. This proceeding is given in lieu of the old mode of compelling appearance by *distringas*. The *distringas*, it is to be observed, gave the party notice: therefore it should seem that the order under this statute ought in some way to give the defendant notice. On the other hand, it is difficult to see how such notice is to be given, seeing that the order is made only where it appears that all due diligence has been used to serve the writ, and the party keeps out of the way. Upon the whole, therefore, I see no necessity for serving the rule or order. The object of the new practice was, to save expense. If we are satisfied that the writ came to the knowledge of the defendant, and that he evades service, surely he has all the notice that can reasonably be required. All the plaintiff wants, is, the authority of the court to proceed as if there had been a personal service. I think the rule should be absolute.

The rest of the court concurring,

Rule absolute.(a)

(a) The facts stated in this affidavit would have amounted to personal service under the old practice: see *Boswell v. Roberts*, Barnes, 422, *Arrowsmith v. Ingle*, 3 Taunt. 234, *Aldred v. Hicks*, 5 Taunt. 186 (E. C. L. R. vol. 1).

**\*723] \*THE BRITISH EMPIRE MUTUAL LIFE ASSURANCE  
COMPANY v. BROWNE. Nov. 8.**

A contract entered into "on behalf of" a joint-stock company, within the 7 & 8 Vict. c. 110, s. 44, means, a contract by which the company contracts to do something: and that section does not prevent the company from enforcing against third parties a contract which is unilateral only, and which (though they are expressed to be parties to it) has not been executed by the company.

**COVENANT.** The declaration,—which described the plaintiffs as "being a joint-stock company which before and at the time of the making of the indenture thereafter mentioned, was, and still is, completely registered and incorporated, and had obtained, and still has, a certificate of complete registration under and by virtue of and according to the statute 7 & 8 Vict. c. 110, intituled, &c., and other the statutes in such case made and provided,"—stated, that theretofore, to wit, on the 5th of February, 1851, by a certain indenture then made between one W. Loder and Elizabeth Dring, his wife, of the first part, the defendant of the second part, the plaintiffs of the third part, and Richard Cartwright, F. Cuthbertson, John Gover, and W. Groser, therein described as the general trustees of the said company, and which said trustees and the survivors and survivor of them, his heirs, and their and his assigns, so far as regards the real estate thereafter mentioned, and the survivors and survivor of them, his executors and administrators, and their and his assigns, with respect to the personal estate thereafter mentioned, were and are designated by and included in the expression, where the same was and is thereafter used, of "the said trustees," of the fourth part,—proferet,—after reciting that the said W. Loder had requested the plaintiffs to advance to him the sum of 200*l.*, which they had agreed to do, on his granting to them, in consideration thereof, an annuity of 82*l.* 5*s.* 6*d.*, for the term of three years if the several persons thereafter in that behalf named, or the survivor of them, should so long live, to be payable and secured as

**\*724] \*thereinafter mentioned, in consideration of 200*l.* being paid by the plaintiffs to the said W. Loder upon the execution thereof,** the receipt whereof was thereby acknowledged; the said W. Loder and the defendant did, and each of them did thereby, for himself and themselves, and their respective heirs, executors, and administrators, jointly and severally covenant and agree with the plaintiffs, their successors and assigns, that the said W. Loder, his heirs, executors, or administrators, should and would pay unto the plaintiffs, their successors or assigns, one annuity of 82*l.* 5*s.* 6*d.* during the term of three years, to commence from the 1st of February, 1851, if one T. Smith, one J. Martin, one H. Gover, and one F. J. Timms, or the survivor of them, should so long live, and to be paid on the 1st of February in each year of the said term, without any deduction thereout,—the first payment

thereof to be made on the 1st of February, 1852, and the last payment thereof on the 1st of February, 1854, if the said term should so long continue; and also that the said W. Loder, his heirs, executors, or administrators, should and would, until the whole of the said annuity, and all arrears thereof, and all costs and charges incident thereto, should be fully paid and satisfied, keep on foot the several policies of assurance which the said W. Loder had effected with the plaintiffs on the lives of himself and his said wife, for 200*l.* each, dated the 4th of February, 1851, and numbered respectively 3756 and 3757, which he had that day deposited with the plaintiffs for the better securing the due payment of the said annuity; and that, in case he should neglect to pay the premiums thereon, then that the said trustees might pay the same; and that the said W. Loder, his heirs, executors, or administrators, should, upon demand, repay to them the amount of the moneys so paid,—as by the said indenture would more fully appear: Averment, that the said T. Smith, J. Martin, H. Gover, and F. J. Timms [\*725] were still living, and the said term of three years had not yet elapsed, and still continued; nevertheless, that, after the making of the said indenture, and during the said term of three years, and during the lives of the said T. Smith, J. Martin, H. Gover, and F. J. Timms, to wit, on the 1st of February, 1852, 82*l.* 5*s.* 6*d.* of the said annuity, for one year then last elapsed, became and was due and payable to the plaintiffs; yet the said W. Loder did not nor would pay the same to the plaintiffs when it became due, or at any other time, nor had the defendant paid the same, and the same remained wholly due and unpaid, contrary to the said covenant in that behalf so made as aforesaid: that the said W. Loder did not, after the making of the said indenture, keep on foot the said policy of assurance so effected by him with the plaintiffs on the life of himself, for 200*l.*, and afterwards, to wit, on the 21st of January, 1852, wholly omitted and neglected so to do, and did not nor would pay to the plaintiffs a certain premium amounting to 5*l.* 10*s.* 8*d.* which became and was by the said policy due and payable to the plaintiffs, in order and for the purpose of keeping the said policy on foot, and thereby the said policy ceased being kept on foot by him, contrary to the said covenant in that behalf. [There was a similar breach as to the policy on the life of the wife]: and so the plaintiff said that the defendant had broken his said covenant, &c.

The defendant craved oyer of the indenture, which was set out, as follows:—“This indenture, made the 5th of February, 1851, between W. Loder, of, &c., and Elizabeth Dring, his wife, of the first part, W. Browne, of, &c., of the second part, The British Empire Mutual Life-Assurance Company, of the third part, and R. Cartwright, F. Cuthbertson, J. Gover, and W. Groser, the general trustees of the said company, and which said trustees, and the survivors and survivor of them, his

\*726] heirs, and their and his assigns, so far as regards the real estate  
 \*hereinafter mentioned, and the survivors and survivor of them, his executors and administrators, and their and his assigns, with respect to the personal estate hereinafter mentioned, are designated by and included in the expression, where the same is hereinafter used, of "the said trustees," of the fourth part: Whereas, the said W. Loder hath requested the said company to advance to him the sum of 200*l.*, which they have agreed to do, on his granting to them, in consideration thereof, an annuity of 82*l.* 5*s.* 6*d.* for the term of three years if the several persons hereinafter in that behalf named, or the survivors of them, shall so long live, to be payable and secured as hereinafter mentioned: Now, this indenture witnesseth, that, in consideration of the sum of 200*l.* sterling to the said W. Loder upon the execution hereof paid by the said company (the receipt whereof is hereby acknowledged), they the said W. Loder and W. Browne do, and each of them doth hereby, for himself and themselves, and their respective heirs, executors, and administrators, jointly and severally covenant and agree with the said company, their successors and assigns, that the said W. Loder, his heirs, executors, or administrators, shall and will pay unto the said company, their successors or assigns, one annuity of 82*l.* 5*s.* 6*d.* during the term of three years, to commence from the 1st of February instant, if T. Smith, J. Martin, H. Gover, and F. J. Timms, or the survivor of them, shall so long live, and to be paid on the 1st of February in each year of the said term, without any deduction thereout,—the first payment thereof to be made on the 1st of February, 1854, if the said term shall so long continue; and also that the said W. Loder, his heirs, executors, or administrators, shall and will, until the whole of the said annuity, and all arrears thereof, and all costs and charges incident thereto, shall be fully paid and satisfied, keep on foot the two  
 \*727] \*several policies of assurance which the said W. Loder has effected with the said company on the lives of himself and of his said wife, for 200*l.* each, dated the 4th of February, and numbered respectively 3756 and 3757, which he has this day deposited with the said company, for the better securing the due payment of the said annuity; and that, in case he shall neglect to pay the premiums thereon, then that the said trustees may pay the same; and that the said W. Loder, his heirs, executors, or administrators, shall, upon demand, repay to them the amount of the moneys so paid: And this indenture further witnesseth, that, for the considerations aforesaid, and for better securing the said annuity, they, the said W. Loder and Elizabeth Dring his wife, so far as regards their estate and interest, or the estate and interest of the said W. Loder in right of his said wife, expectant upon, and to take effect upon, the decease of Mary Ann Maslin, the mother of the said Elizabeth Dring, do, and each of them doth, hereby grant, bargain, sell, alien, release, and confirm unto the

said trustees, all that their sixth part or share, and all other their share and interest of and in all that freehold messuage or tenement, farm, lands, hereditaments, and premises, with the appurtenances, situate, &c., in the parish of Winkfield, in the county of Berks, and now in the occupation of the said Mary Ann Maslin, or her tenants, and all ways and appurtenances thereto belonging, and all the estate, right, title, and interest of them the said W. Loder and of his said wife, or either of them, to the same, to have and to hold the said premises under the said trustees for ever, subject as hereinafter mentioned: And this indenture further witnesseth, that, for the considerations aforesaid, they the said W. Loder and Elizabeth his wife, so far as regards their estate and interest, or the estate and interest of the said W. Loder in right of his said wife, expectant as aforesaid, do, and each of them doth, bargain, \*sell, and assign unto the said trustees [\*728 all that their sixth part or share, and all other their share and interest of and in all that leasehold messuage or tenement and premises situate in Wardour Street, Soho, in the county of Middlesex, and also all other the share and interest whatsoever, present and future, of them the said W. Loder and Elizabeth Dring his wife, or of either of them, of and in all moneys, estate, and effects whatsoever, which they are, or either of them is, in any way entitled to under or by virtue of the last will and testament of Charles Maslin, deceased, the father of the said Elizabeth Dring Loder, dated on or about the 19th of November, 1836, &c., and all the right, title, &c., of them the said W. Loder and Elizabeth Dring his wife, or either of them, to the said hereby assigned premises,—to have and to hold the said leasehold premises unto the said trustees for all the residue of their term and interest therein, save the last day thereof, and all other the said personal estate, unto the said trustees for ever: And it is hereby agreed and declared that the said trustees shall stand possessed of and interested in the said premises, upon trust for securing the due payment of the said annuity, and, for that purpose, upon trust that, if the said annuity, or any part thereof, shall at any time be in arrear for seven days next after any of the days hereinbefore appointed for the payment thereof, by and out of the said hereby-assigned premises, or by mortgage or absolute sale thereof, by public auction or private contract, without any previous notice, or by all or any of the said ways or means, at their discretion, to levy and raise such sum and sums of money as shall be necessary for paying and satisfying the said annuity, and all costs and charges which the said company, or the said trustees, shall or may sustain, expend, or be put unto by reason of the non-payment thereof, or otherwise in execution of the trusts thereof, and do and \*shall pay and apply the money so to be levied and raised in [\*729 and towards payment and satisfaction of the said arrears, and

the accruing payments of the said annuity, and of all costs and charges accordingly, and pay the residue, if any, unto the parties entitled to the same: Provided, always, and it is hereby agreed and declared, that all contracts, mortgages, sales, assignments, and things which shall be entered into, made, and executed by the said trustees, of or concerning the said hereby-assured premises, or any part thereof, shall to all intents and purposes be as valid and effectual in the law as the same would have been if the said W. Loder and Elizabeth Dring his wife, their or either of their heirs, executors, administrators, or assigns, had actually joined in and executed the same; and also that the said trustees shall not be answerable for any loss which may happen in the execution of the trusts hereof, unless the same shall happen through their own wilful default; and that the receipt or receipts of them the said trustees for any moneys payable to them by virtue hereof, shall sufficiently discharge the persons paying the same, and who shall not be liable to see to the application of such moneys, nor be answerable or accountable for the loss or misapplication thereof, nor be obliged to inquire or ascertain whether such mortgages or sales as shall have been made by the said trustees by virtue hereof, shall have been necessary for all or any of the purposes hereinbefore mentioned: And, for the better enabling the said trustees to have, receive, and take the hereby-assigned premises, they the said W. Loder and Elizabeth Dring his wife do, and each of them doth, hereby irrevocably nominate, constitute, and appoint the said trustees, their, his, and her true and lawful attorneys and attorney, to ask, demand, sue for, and recover, receive, and take the payment, transfer, and assignment of the said hereby-assigned premises, and \*730] every part and parcel thereof, \*and, on receipt thereof, to make, sign, and give such receipts, releases, and discharges in the law for the same, as shall be necessary, and, on default thereof, to commence and prosecute with effect all such actions, suits, and other proceedings at law and in equity for the recovery thereof, as the said attorney shall be advised, and generally to do and perform all and every such further and other acts, deeds, matters, and things in the premises, as he or they shall think fit: And the said W. Loder, for himself and his said wife, and for their respective heirs, executors, and administrators, doth hereby covenant and declare to and with the said trustees, that they have, or one of them now hath, in himself or herself, full power and absolute authority to charge all and singular the said premises hereby charged with the payment of the said annuity, and convey and assure the said premises as aforesaid; and also that the said premises shall be holden and enjoyed without any hindrance, interruption, claim, or demand whatsoever from or by them the said W. Loder and Elizabeth Dring his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, or any other person whomsoever: and that free and clear, and freely and clearly acquitted,

exonerated, and discharged by them the said W. Loder and Elizabeth Dring his wife, their or either of their heirs, executors, administrators, and assigns, of, from, and against all and all manner of former estates, titles, charges, and encumbrances whatsoever; and, further, that they the said W. Loder and Elizabeth Dring his wife, their and each of their heirs, executors, administrators, and assigns, and every other person lawfully and equitably claiming any estate, right, title, or interest whatsoever, in, to, or out of the said premises hereby charged or conveyed and assured, or any part thereof, shall and will at all times hereafter, upon every reasonable request of the said trustees, but, until such \*mortgage or sale shall be made, at the costs and charges of the [731 said W. Loder and Elizabeth Dring his wife, or one of them, their or one of their heirs, executors, administrators, or assigns, and, after such sale or mortgage, then at the costs and charges of the persons requiring the same, make, do, and execute all such further and other lawful and reasonable acts, deeds, matters, and things whatsoever as may be necessary for the more effectually charging, granting, mortgaging, and assuring the said hereby-assured premises unto the said trustees, or any mortgagee or purchaser thereof: And, lastly, that, when and so soon as by the expiration or other sooner determination of the said term of three years, the annuity hereby granted shall cease to be payable, and all arrears thereof, and all other sum and sums of money due and payable to the said trustees shall have been fully paid and satisfied, then these presents, and everything herein contained, shall cease and be void, but subject and without prejudice to any act, deed, matter, or thing which shall in the meantime have been made and done by virtue hereof." The plea then stated, that, before and at the time of the making of the said supposed indenture, the plaintiffs were, and from thence hitherto had been and still were, a joint-stock company completely registered under the 7 & 8 Vict. c. 110, intituled, &c., and that the said supposed indenture, and the covenant in the declaration mentioned, was a contract entered into on behalf of the said joint-stock company so completely registered as aforesaid, and was not nor is it a contract for the purchase of any article the payment or consideration for which did not or does not exceed the sum of 50*L.*, or for any service the period of which did not or does not exceed six months, and the consideration for which did not or does not exceed 50*L.*, and was not nor is it a bill of exchange or promissory note; and that the said contract, indenture, and covenant was not nor is it \*signed by two of the directors of the said company, and [732 sealed with the common seal thereof, or signed by any officer of the said company on its behalf thereunto expressly authorized by any minute or resolution of the board of directors, applying to the particular case, whereby and by force of the statute in such case made, the said contract, indenture, and covenant was and is void and ineffectual,



except as against the plaintiffs, being the company on whose behalf the same had been made,—verification.

Special demurrer, for that the matters of defence therein pleaded do not constitute any defence, for that they do not make the said indenture void and ineffectual against the plaintiffs; that the requisites therein alleged are not necessary for such an indenture; that the indenture is not a contract within the meaning of the enactment of the statute referred to in the plea; and that the plea is double, for relying upon both want of signature and want of sealing, &c. Joinder in demurrer.

*Willes*, in support of the demurrer.—The contract declared upon is essentially unilateral,—to be performed by the defendant. The deed recites that the company advanced the 200*l.* as agreed; and it contains covenants in favour of the company, in consideration of such advance. One of the covenantors now objects that the plaintiffs cannot recover, because *they* have not executed the deed. This objection is based upon the 44th section of the 7 & 8 Vict. c. 110: but it will be necessary to find very stringent language in that section to sustain it. The words are,—“for the purpose of regulating contracts entered into on behalf of any joint-stock company completely registered under this act (except contracts for the purchase of any article the payment or consideration for which doth not exceed the sum of 50*l.*, or for any service the period of which doth not exceed six months, and the consideration \*733] for which doth not exceed 50*l.*, and *\*except bills of exchange and promissory notes*), be it enacted, that every such contract shall be *in writing*, and *signed by two at least of the directors of the company* on whose behalf the same shall be entered into, and *shall be sealed with the common seal thereof*, or *signed by some officer of the company* on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made); and that every such contract for the purchase of any article the consideration of which does not exceed the sum of 50*l.*, or for any services the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, entered into on behalf of any joint-stock company completely registered under this act, may be entered into by any officer authorized by a general by-law in that behalf; and that every such contract, whether under seal or not, shall immediately after the same shall have been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay

to the company on whose behalf such contract may be made, the amount of the consideration agreed to be paid by or on behalf of such company in respect of such contract." This is an enactment designed for the protection of joint-stock companies; its object throughout seems to be, to give the shareholders certain privileges and immunities. But for the suggestion thrown out in *Ridley v. The Plymouth, &c., Grinding and Baking Company*, 2 Exch. 711,† that a contract \*not entered into in compliance with that section cannot be enforced by the company, there would have been little difficulty here. [MAULE, J.—There is no stipulation in this deed for anything to be done by the company.] None. The 44th section was intended to apply only to cases where there is a mutuality, where the things contracted to be done on the one side form the consideration for what is to be done on the other side,—as in the case of a lease, where the whole consideration for what the tenant contracts to do, is, the leasing of the land. If the landlord does not execute the lease, the consideration fails. The leading case upon that subject is *Soprani v. Skurro*, Yelv. 18. There, "Soprani and Barnardi brought assumpsit against Skurro, and declared that it was agreed between the plaintiffs and one Zanches, that Zanches should demise to one Welsh a messuage for seven years, and that it was agreed that Welsh during the same term should repair the house with tile and glass only; and it was agreed that these and other covenants should be put into an indenture between the said Welsh and Zanches, and that the plaintiffs should be bound in 100*l.* for the performance of the covenants on the part of Welsh; and they further showed that an indenture was drawn, and because there were more covenants put into the indenture to be performed on the part of Welsh than were at first agreed, viz., that Welsh should be bound to all manner of repairs, Welsh refused to seal the indenture, and the plaintiffs refused to seal the bond of 100*l.* for performance, &c.; they further showed, that, in the said house there was a great wall, parcel of it, ruinous and likely to fall within the term; and that Skurro, the defendant, in consideration Welsh would seal the indenture, and the plaintiffs the bond of 100*l.*, undertook and promised the plaintiffs that he would maintain the said wall durante prædicto termino 7 annorum: they showed, that, in \*consideratione inde, Welsh sealed the indenture as his deed, to Zanches, and that the plaintiffs also sealed the bond of 100*l.* to the said Zanches; and said, in fact, that the wall of the said house fell, for want of repairs, within the said term; and showed in certain when, both after the sealing and delivery of the said indenture by Welsh, and of the said bond by the plaintiffs (viz. in his verbis, durante prædicto termino 7 annorum per indentur' præd' dimiss'), whereby they had forfeited their bond, to their damage 200*l.*; and, upon non assumpsit pleaded, it was found for the plaintiffs. And it was moved in arrest of judgment that the declaration was insufficient; for, the action is founded

on a breach of promise in the defendant for not repairing a wall, parcel of the house agreed to be demised to Welch by Zanches; but it is not expressly alleged that Zanches did demise the said house; and, if there is no demise, then there is no possibility for the defendant to repair it during the term; for, non constat that there is any term: and a good exception, *per totam curiam*; because, for anything that appears in the declaration, the indenture sealed was only on the part of the lessee, and not on the part of Zanches, the lessor; and, if the lessee seals his part, and not the lessor, *nihil operat.*, neither in respect of the interest, nor in respect of the covenants; for, the covenants depend upon the lease, and the plaintiff's bond upon the covenants; and, if there is no lease, there is no covenant, and by consequence no breach of the covenant, whereby the plaintiffs can in any sort be damaged; for, if the lease had been made, and afterwards surrendered, all the covenants and the bond for performance of them had been void also." In *Pitman v. Woodbury*, 8 Exch. 4,† where this matter is much discussed, Parke, B., says: "The cases establish, that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he \*himself never did; for he is a party, although he did not execute, and parties to an indenture may sue, though strangers cannot; and it makes no difference that the covenants of the defendant are therein stated to be *in consideration* of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration. But, with respect to leases by indenture, the older authorities show that the covenants, which depend on the interest of the lease, and are made because the covenantor has that interest,—such as those to repair and pay rent during the term, are not obligatory, if the lessor does not execute,—not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate, as such covenants undoubtedly do not, if the term ends by surrender, and are suspended by eviction by the lessor, so they do not begin to operate unless the term commences: the foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair *during it*, is void. But, with respect to collateral covenants, not depending on the interest in the land, it is otherwise, and they are obligatory." The matter was also discussed in *Cooch v. Goodman*, 2 Q. B. 580 (E. C. L. R. vol. 42), where the Court of Queen's Bench expressed an inclination of opinion, that it was not necessary that the landlord should have executed the lease, provided the tenant has had the enjoyment of the land. [JERVIS, C. J.—So I should have thought. In *Pitman v. Woodbury*, it may be that both parties had repudiated the contract, and elected to treat it as a tenancy from year to year: and in *Soprani v. Skurro*, it may be that the lessee never was in possession.] The 44th section is confined to cases where there is mutuality, where the execution of the contract by

the company is essential, and would compel them to do something. [JERVIS, C. J., referred to *Smith v. The Hull Glass \*Company*, [\*737 11 C. B. 897 (E. C. L. R. vol. 73).] In *Rose v. Poulton*, 2 B. & Ad. 822 (E. C. L. R. vol. 22), Lord Tenterden says: "Whether an entire failure of consideration will in all cases relieve a party from the obligation of his deed, it is not necessary at present to inquire. In the case of a lease not executed by the lessor, it certainly does, because, in default of such execution, there is no lease." That shows that the case of the lease is the single exception.

*Hugh Hill*, contra.—The contract in question, it is submitted, is a contract within the meaning of the 44th section of the 7 & 8 Vict. c. 110, and void, except as against the company, for the reasons stated in the plea. No doubt there are many cases where a covenantee may sue for a breach of the covenants, although he has not executed the deed. The authorities upon the subject are collected in *Wetherell v. Langston*, 1 Exch. 634.† So, in *Laythoarp v. Bryant*, 2 N. C. 735, 3 Scott, 238, it was decided, that, a contract within the 4th section of the statute of frauds, 29 Car. 2, c. 3, may be sued on by a party who has not signed it. But here there is nothing but the execution of the deed by the company to bind them to assent to the parties of the fourth part being trustees. The deed provides, in language which, according to the rule laid down in *Pordage v. Cole*, 1 Wms. Saund. 319, are words of covenant by each party, that the trustees should stand possessed of the property conveyed to them, upon trust to sell the same if the annuity should be in arrear. The contract, on the face of it, is expressed to be made on behalf of the company; it is not competent to them, therefore, to say that it is not made on their behalf. But for the exceptions, it might well have been that "contracts" in the statute was intended to mean contracts which required execution by the company to give them validity. It would, however, lead to great inconvenience, to depart from the plain meaning \*of the words used. In *The Copper Miners' Company v. Fox*, 16 Q. B. 229 (E. C. L. R. vol. [\*738 71), in assumpsit by a corporation on a contract for the supply of iron rails to the defendant, averring mutual promises, the defendant pleaded non assumpsit only. On the trial, the plaintiffs proved the making of the contract in fact; the defendant proved a charter incorporating the plaintiffs for the purpose of trading in copper-ore, but containing nothing as to trading in iron. No other charter was proved: nor was there any evidence that the contract proved was in any way ancillary to the trade in copper. It was held that the contract, not being under seal, and not being for the trading purpose for which the plaintiffs were incorporated, *did not bind the plaintiffs*, and that the defendant was entitled to the verdict on non assumpsit, *as there was no consideration for his promise*. Lord Campbell, in giving judgment, says: "By the statute of frauds, no action can be brought upon certain agreements,

unless there be a memorandum thereof signed by the party to be charged; and the courts have very properly held that a party who has signed a memorandum of the agreement, may be sued upon it, although the other party has not; because, there, the requisition of the statute has been complied with, and there is such an agreement as the party suing alleges. But, here, the consideration for the defendant's promise, is, an alleged promise by the plaintiffs; and, their supposed promise given in evidence being void, the contract alleged is not proved. It would, indeed, be strange if a corporation entering into a commercial contract, might enforce it at pleasure, but might break it with impunity, wherever fraudulently induced to do so. The plaintiffs finally rely upon a suggestion of Tindal, C. J., in *The Fishmongers' Company v. Robertson*, 5 M. & G. 131, 192 (E. C. L. R. vol. 44), 6 Scott, N. R. 56, 105, that, when a corporation have sued as plaintiffs upon a simple \*739] contract, they may possibly for ever be estopped from objecting that the contract was not binding upon them, so as to afford a remedy to the other side by cross-action, and to take away the objection of want of reciprocity. But there is great difficulty in saying what shall be the form of action to which the opposite side may resort, or from what point of time the estoppel is to operate; and, after all, it would only give a remedy upon the contract, where the corporation have deemed it for their advantage to enforce it by action, the other side being left without remedy where the corporation wish entirely to break and abandon it. Besides, giving full effect to the supposed estoppel, and supposing that hereafter the now plaintiffs might be sued in an action of covenant on this contract (the want of profit being somehow excused), still the estoppel would not prove the contract set out in this declaration, which supposes the promises on either side to be without seal. On no ground, therefore, can the action be supported." It is submitted, therefore, that, there being certain provisions in this deed which profess to bind the company, and the contract purporting to be made on behalf of the company, it is a contract within the 44th section of the statute, and void for not being executed in compliance with the provisions of the act.

*Willes* was heard in reply.

JERVIS, C. J.—I am of opinion that the plaintiffs in this case are entitled to judgment. It is admitted by Mr. Hill, that the 44th section of the statute applies only to such contracts as are entered into on behalf of the company; and admitting that a bond or a deed-poll is not within that section, it is suggested that a more general application is to be given to the words used, by reason of the exception, and that every case which does not fall within the exception, must come within \*740] the general words. The 44th section in effect says that all contracts entered into on behalf of a completely registered company, shall be executed in a given manner, and that, in the absence of

such requisites, or of any of them, every such contract shall be void and ineffectual, except as *against* the company on whose behalf the same shall have been made. The question is, whether this is or is not "a contract made on behalf of the company." It seems to me that it is not. Mr. Hill says it is, from the form of the contract, because there is a covenant on the part of the trustees of the company to do certain things. I apprehend that is not the fair meaning of the contract. The contract is in effect this:—The company advance a sum of money to Loder, in consideration of which he grants them an annuity of 82*l.* 5*s.* 6*d.* for three years, for the due payment of which the defendant covenants jointly with him; and Loder, by way of further security, deposits with the trustees certain policies, and, together with his wife, assigns to the company a reversionary interest of the latter, with power to the trustees to sell the same for the purpose of paying the annuity, in case of default. This is not a covenant that the trustees shall do an act, but a mere condition or qualification of the grant, and would be equally binding on the trustees, whether the company executed the deed or not. It seems to me that the 44th section was meant to be confined to cases where the company bind themselves to do something, in consideration of which something else is to be done by the other party: and then the contract must be under seal, and made with the additional formalities pointed out by the section. If it be not so made, the party contracted with may enforce the contract against the company, but the company cannot enforce it against him. That certainly seems somewhat hard; but the object evidently was, to compel these companies so to contract as to secure justice being done to <sup>\*the</sup> interests as well as of the shareholders as of those with whom <sup>[\*741]</sup> they contract. If that be so, this contract, being entirely unilateral, clearly is not within the act of parliament.

MAULE, J.—I am of the same opinion. The object of this section of the act may not be very transparent; but I think the words of it are plain enough. Apart from the act of parliament, is this a contract entered into on behalf of the company? Here is a covenant by the defendant and another to pay certain moneys to certain covenantees. As soon as the deed was executed by the covenantors, it was competent to the covenantees to sue upon it, without any act done by them. That, I think, sufficiently shows that this is not a contract entered into on behalf of the company. It was not necessary for the company to know anything about it. According to the law as expounded in *Wetherell v. Langston*, 1 Exch. 684,† this contract only requires of the company the act of suing upon it. The act of parliament, therefore, does not apply: the words as well as the spirit of it comprehend only contracts which are made for the purpose of binding the company. So far I have considered the case simply with respect to the general effect

of the deed. The particular terms in which the deed is worded, can make no difference.

TALFOURD, J.—I am of the same opinion. The only question is, whether or not this is a contract made on behalf of the company, within the meaning of the 44th section of the statute, that is, whether it is a contract whereby the managers or trustees professed to bind the company. For the reasons above given, I am of opinion it is not within the act. Judgment for the plaintiffs.

\*742] \*WILLOUGHBY and Others, Appellants; HORRIDGE, Respondent. Nov. 19.

The lessees of a ferry provided steamboats for the conveyance of passengers, goods, and cattle from A. to B., and also slips for landing and embarking, which were (generally) sufficient for the purpose:—Held, that they were liable for an injury sustained by the horse of a passenger, in consequence of the side-rail of the landing-slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control and management of its owner.

THIS was a plaint in the county court of Cheshire, at Birkenhead, entered on the 17th of June, 1852, and tried, without a jury, on the 8d of July. The particulars of the plaintiff's demand or claim, were as follows:—

“In the County Court of Cheshire, at Birkenhead.

“Between John Horrridge, plaintiff, and E. G. Willoughby and another, defendants.

“This action is brought to recover the sum of 31l. 10s., on the following grounds of action, viz. for that you, as carriers for hire, were intrusted with certain goods, to wit, a mare, of the plaintiff, to be carried from Birkenhead to Liverpool, and that, by your negligence, the said mare was staked, cut, and wounded, and in consequence thereof was obliged to be and was destroyed, to the plaintiff's damage of 31l. 10s.”

The defendants are lessees of a ferry across the river Mersey, running their steamboats, at short intervals throughout the day, between Liverpool and Birkenhead, to and fro, for the conveyance of passengers and goods for hire; and it is part of their duty to provide accommodation for embarking and landing at both sides of the river. It is not the practice of the defendants to take charge of horses, cattle, or other live animals, while on board their steamboats: and, on the occasion in question, the defendants did not themselves, nor by their boatmen or servants, in any way interfere with the plaintiff's mare, from the time  
\*743] she was taken on board by the \*plaintiff himself at Birkenhead, until the injury occurred, as hereinafter mentioned.

In the month of May last, the plaintiff rode his mare to the ferry at

Birkenhead, paid one shilling (being the usual charge for the conveyance of a horse to Liverpool), led her on board himself, and remained with her until the steamboat was properly moored alongside of a large floating landing-stage at Liverpool, which is used for the convenience of all the ferries,—eight or ten in number.

The floating landing-stage is several feet higher than the decks of the steamboats: and, for the landing of passengers, horses, &c., movable slips, the property of the lessees or proprietors of the different ferries, are used. These slips have light hand-rails on either side; and, though suitable for foot passengers, are apparently too slight, and not of the best construction for landing horses, or other heavy animals: but the defendants' slip did not differ in appearance from those used by the conductors of the other ferries: and, if it had been sound, or even if it had not been known to be unsound, the judge stated that he would have considered the injury accidental, and would not have visited the defendants with damages.

It was proved that one of the hand-rails of the slip in question had been broken by a horse about a fortnight before; that it was broken in the centre, where a sharp-pointed upright supporter of iron entered it; and that the rail was then tied together again with a piece of cord, and used as before; and that again, on the morning of the day on which the plaintiff's mare was injured, the same rail had been broken a second time by a horse falling against it; after which the defendants had been distinctly cautioned by a policeman on duty, that, if they persisted in using that slip, they would be reported: notwithstanding which, the railing was again put together, \*and, the plaintiff's mare (while she was being led by the plaintiff from the boat to the landing-stage) pressing against it, the two pieces of the hand-rail parted, and the mare was pierced by the iron upright before mentioned, and was so much hurt that it was necessary to destroy her at once. [\*744]

The plaintiff had no knowledge that the hand-rail had been broken; nor was there anything in its appearance to attract attention.

For the defendants, it was contended, that, under the circumstances, they were not liable; that all they undertook, was, to find steam-accommodation, and the means of crossing from Liverpool to Birkenhead, and from Birkenhead to Liverpool; that they never took charge of live animals; and that, as the mare in question remained the whole time under the control and management of the plaintiff himself, she was at his risk, and that the defendants could not be legally held responsible for the injury the plaintiff had sustained.

The judge was of opinion that the injury was caused by the defective hand-rail; and, that, to persist in using the slip after two accidents, and particularly after what had occurred that morning, was so careless and culpable an act as to make the defendants responsible for the consequences. He therefore ordered the verdict to be entered for the plaintiff for 31*l.* 10*s.*, being the value of the mare.



*Edward James*, for the appellants.—The decision of the judge of the county court was wrong, and must be reversed. The action is against the defendants as common carriers, and for an injury to the plaintiff's mare during the time of its being conveyed by them as such carriers. The judge has found that the defendants were not in fact common carriers, and that the mare was never in their custody or under their control as carriers ;

\*745] \*and yet he has decided that they are responsible for the injury she sustained. This is not an action charging the defendants with a breach of their duty as ferrymen, but for an accident which happened after their duty as ferrymen was completely at an end. [JERVIS, C. J.—Their contract is, to find a safe and convenient floating-bridge, or conveyance in the nature of a bridge, between Birkenhead and Liverpool. What they do, is, to provide a safe and convenient bridge to within a few feet of the latter place. Suppose, instead of the accident resulting from a defective hand-rail, there had been a hole in the deck of the steamboat, through which the plaintiff's mare put her leg and broke it, would not the defendants have been liable?] Not in this form of action. In *Walker v. Jackson*, 10 M. & W. 161,† a declaration in case against the owners of a ferry, stated that the defendants were possessed of a ferry across the river Mersey, from Woodside to Liverpool, and that the plaintiffs delivered to them certain goods, to wit, a phaeton and certain jewellery and watches contained in it, to be by the defendants, for reward to them in that behalf, taken care of and carried in a certain steamboat from Woodside to Liverpool, *and there landed* for the plaintiffs; that the defendants accepted and received the said carriage, so containing the said jewellery and watches, from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, *and landing* of the same as aforesaid; and assigned for breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, *and landing* of the same, that they were injured. The defendants pleaded, that the plaintiffs did not deliver to the defendants, nor did they accept and receive from the

\*746] plaintiffs, the goods in the declaration mentioned, to be \*by them carried and conveyed in the said steamboat from Woodside to Liverpool, and *there landed*, for the plaintiffs, for reward to them in that behalf, modo et formâ. It was held, that a contract to carry *and land* the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry: but that it was a question for the jury whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river. It appeared that the plaintiff went on board the defendant's steamboat, with his horse and carriage, paying

the defendant's charge for a "light four-wheeled phaeton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendants. The carriage was taken safely across the river, and, on the arrival of the boat at the pier-head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but, in doing so, were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured: and it was held, that the plaintiff's right of action for this injury was not affected by his not having communicated the fact of the jewellery and watches being contained in the carriage; and that it was a further question for the jury (supposing a contract to land were established), whether the landing was complete, under the above circumstances. [JERVIS, C. J.—No objection seems to have been taken to the form of the plaint here.] The objection evidently was, that the defendants were not liable *as carriers*. [MAULE, J.—Substantially this is an action against the defendants for negligence in providing an insufficient slip,—or, rather, in permitting it to be \*used after they had notice of its unfitness.] It is no part of the defendants' duty to provide a slip. [\*747] [MAULE, J.—The case finds that it is part of their duty to provide accommodation for embarking and landing passengers and goods. It is just as much their duty to provide slips as boats.] Considering that this is an action against the defendants as carriers, on their common-law liability, they cannot be responsible unless they were intrusted with the mare as carriers, and the injury was done during the transit. A plaintiff in the county court cannot give evidence out of the plaint,—9 & 10 Vict. c. 96, ss. 59, 75; and by the 27th of the rules of practice made in pursuance of the 12 & 13 Vict. c. 101, s. 12, the particulars are to be taken to be, and be treated as, part of the summons. [MAULE, J.—That makes them perfectly different from particulars of demand in an action in the superior courts. JERVIS, C. J.—The summons is not before us; you have not the materials to raise the technical objection.] The judge states the case as he pleases. [MAULE, J.—The case as stated does not show that the defendants are charged as carriers alone: we must look at what the question is. The case thus states it:—"For the defendants, it was contended, that, under the circumstances, they were not liable: that all they undertook was, to find steamboat accommodation, and the means of crossing from Liverpool to Birkenhead, and from Birkenhead to Liverpool; that they never took charge of live animals, and that, as the mare in question remained the whole time under the control and management of the plaintiff himself, she was at his risk, and the defendants could not be legally held responsible for the injury the plaintiff had sustained." The judge finds that the defendants had been guilty of culpable negligence, and that they are

responsible,—not *as carriers*. No doubt they are liable.] If this had  
 \*748] been an action against the defendants as ferrymen, they \*clearly  
 would not have been liable. The plaintiff can only recover by  
 reason of some breach of duty. What breach of duty is charged here?  
 [MAULE, J.—Providing a slip with an insufficient hand-rail.] The  
 defendants have performed their duty when they have provided a suffi-  
 cient platform: to omit to furnish it with a hand-rail was no breach of  
 duty. [MAULE, J.—Suppose it was the duty of one to provide another  
 with a chair; I apprehend that duty could not be said to be fitly and  
 adequately performed, by providing him with a chair having a tenpenny-  
 nail driven up through the bottom of it.] The hand-rail could only be  
 of use to human passengers. The accident was evidently occasioned  
 by the plaintiff's own negligence, in allowing the mare to run against  
 the rail. There is no finding that the slip was in itself defective, apart  
 from the insufficiency of the hand-rail. There was, therefore, clearly  
 no evidence whatever to justify the verdict.

*Tomlinson*, for the respondent, was not called upon.

JERVIS, C. J.—It seems to me that the judge of the county court  
 was quite correct in the view he took, and that his decision must be  
 affirmed. And I do not think the case is open to observation, for not  
 setting out the summons, because it was the duty of the judge to state  
 the case with reference to the objections taken before him; and here,  
 the objection was, not that the form of action was misconceived, as  
 improperly charging the defendants as common carriers, but that they  
 were not liable because they never took upon themselves personally the  
 care and control of the plaintiff's mare. That fully accounts for the  
 absence of the summons. Without reference, therefore, to the sum-  
 mons at all, I do not conceive that the action appears on the par-  
 \*749] ticulars,—construing them as they ought always to be construed,  
 \*viz. with a reasonable degree of liberality,—to be brought  
 against the defendants merely as carriers. The fact of their being  
 carriers is introduced for the purpose of showing how the mare got into  
 their possession; but the foundation of the action is the aggressive  
 negligence of the defendants. In substance, the charge against the  
 defendants, is, that they took the plaintiff's mare for hire, to be con-  
 veyed from Birkenhead to Liverpool, and, through their negligence, the  
 mare was killed. No doubt, the defendants, as ferrymen, are bound to  
 continue the road from Birkenhead to Liverpool, and duly to provide  
 everything necessary to perfect that road. It is not enough for them  
 to convey passengers and goods across the river, unless they also bridge  
 over the intervening space between the vessel and the landing-place.  
 They are as much bound to furnish a safe slip for that purpose, as to  
 furnish a safe vessel to cross the river. It seems, that, on the arrival  
 of the plaintiff with his mare at Liverpool, the slip which the defend-  
 ants had provided had an iron spike sticking up at the side of it, dis-

guised as a hand-rail; and that, the mare pressing against the hand-rail, it gave way, and the spike entered the body of the mare, and so injured her that it became necessary to kill her. If the plaintiff had seen the spike, he might have refused to take the mare over so unsafe a slip. That the defendants knew of its unsafe condition, is clear from the complaint made by the policeman on the subject, on the very morning on which the accident happened. The result is, that the case finds, as a matter of fact, that the defendants were guilty of negligence; and no doubt they are liable for the consequences.

MAULE, J.—I am of the same opinion. Two objections have been urged to the plaintiff's right to recover in this action. The first objection was, that the facts proved at the trial did not show that the liability of the \*defendants was of the description pointed out in the particulars. Now, the particulars are to be read as part of [\*750 the summons; and the summons is not before us: therefore it is admitted that we cannot see what the precise ground of complaint against the defendants was. But I do not think the case proceeded before the judge upon the ground of a variance between the cause of action alleged and that proved. If the point had really been raised at the trial, and the parties had intended to raise it here, and were prevented by the imperfect manner of setting it forth on the case, possibly we might have sent it back to be amended.

The second point, however, which was argued by Mr. James, was evidently the real point raised at the trial, and from the decision on which the appeal was made to turn. The case states that the defendants contended, that, under the circumstances, they were not liable; that all they undertook, was, to find steamboat accommodation, and the means of crossing the river; that they never took charge of live animals; and that as the mare in question remained the whole time under the control and management of the plaintiff himself, she was at his risk, and the defendants could not be legally held responsible for the injury the plaintiff had sustained,—clearly pointing, not to any form of declaring, but to whether the plaintiff could, under the circumstances proved, throw upon the defendants the liability he sought to cast upon them. The judge was of opinion that the injury was caused by the defective hand-rail; and that, to persist in using the slip after two accidents, and particularly after what had occurred that morning, was so careless and culpable an act as to make the defendants responsible for the consequences. It seems to me that the judge was quite right. It was a question of fact, whether the defendants were guilty of negligence in suffering what they knew to be a defective slip to be used, \*or whether the plaintiff's mare came in contact with the spike through any negligence on the part of the plaintiff which ought [\*751 to deprive him of his remedy against the defendants, on the ground that one who is himself partly contributory to the injury of which he

complains loses all claim to redress. The judge came to the conclusion that all the negligence was on the defendants' side, and that the plaintiff himself had been guilty of no negligence. That decision upon a question of fact is binding on the court: and I may observe that it was the only conclusion to which any reasonable man could possibly come. The plaintiff had an undoubted right to have his mare conveyed from Birkenhead to Liverpool without any extraordinary risk during the transit; and if, for want of proper care on their part, she sustained injury, the defendants, upon general principles, are liable. That is the conclusion the judge came to, and the only proper one he could come to.

WILLIAMS, J.—I am of the same opinion. The result of the facts proved at the trial, is, that the defendants, as ferrymen, used steamboats for the transit across the Mersey, from which passengers could not land unless the defendants provided slips as well as boats; and that the defendants were guilty of culpable negligence in providing a slip of so imperfect and insecure a construction, that, without any negligence on the part of the plaintiff, the rail thereof gave way, and a concealed iron spike pierced and killed the plaintiff's mare. That was a degree of negligence for which the defendants undoubtedly were responsible in damages. I also think this breach of duty is in substance imputed by the particulars of demand; though it is not necessary to decide that; for, the point of form is not properly raised before us, and, for anything that appears, was not raised in the county court.

\*TALFOURD, J.—I am of the same opinion. The whole scope  
\*752] of the case shows that the contest before the judge of the county court, was, upon the matter of substance, viz., whether or not the defendants were guilty of the negligence imputed to them, and not mere matter of form. The matter of form is not so presented to us as to enable us to deal with it; and, as far as regards the substance, I concur with the rest of the court in thinking that the judge decided correctly.

Judgment affirmed.

Carriers are liable for damage arising from a defect in the vehicles or machinery employed, though they may not be negligent or unskilful: *Camden R. R. Co. v. Burke*, 13 Wendell, 611.

Ferrymen must have their flats so made that all drivers and carriages can easily enter them: *Miles v. James*, 1 M'Cord, 157. As soon as a carriage is fairly on the drop or slip of a flat, though it be driven by the owner's servant, it is in the ferryman's possession, and he is liable

for any subsequent damage that happens to it or to the horses: *Cohen v. Hume*, 1 M'Cord, 439.

If a carrier use the machinery of a third person in unlading a boat at the end of the voyage, and the goods are injured by the breaking of such machinery, the carrier is liable for the loss: *De Mott v. Laraway*, 14 Wendell, 225. And see *Sager v. Portsmouth R. R. Co.*, 31 Maine, 228.

**LITTLE v. THE NEWPORT, ABERGAVENNY, AND HEREFORD RAILWAY COMPANY. Nov. 25.**

By the 13th section of the railway clauses consolidation act, 8 & 9 Vict. c. 20, it is enacted, that, where a tunnel is marked on the plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, leasees, or occupiers of the land on which such tunnel is intended to be made, shall consent that the same shall not be made.

By s. 14, it is enacted that no tunnel shall be altered or deviated, except that it may be lawful for the company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by a certificate from the board of trade.

And, by s. 15, it is enacted that it shall be lawful for the company to deviate within certain limits.

Held, that the company are bound to make a tunnel at the spot marked, and cannot deviate therefrom, without consent, unless authorized so to do by their special act. But that, where they have deviated their line at a spot where a tunnel is marked, they are not bound to make a tunnel in the deviated line.

THIS was an action upon the case against The Newport, Abergavenny, and Hereford Railway Company.

The second count of the declaration stated, that, after the said company had been provisionally registered as in the first count mentioned, and whilst the said provisional committee were so registered as in the first count mentioned, the said provisional committee caused to be deposited with the clerk of the peace of the county of Monmouth, a certain plan in pursuance of and according to the intent and meaning of certain standing orders of the House of Commons, which said plan was in the form, words, and figures following, that is to say, that the centre of the three black lines delineated on the said plan was [\*753 intended to show the then intended line of the said proposed railway, and the other two of the said three black lines were intended to show the limits within which the said company then proposed to be empowered by the said act to make such deviation in the construction of the said centre line, as by the said first-mentioned act the said company are empowered to make, and the numbers on the said plan were intended to refer, and did refer, to certain corresponding numbers in a certain book of reference deposited by the provisional committee with the said clerk of the peace at the same time as and together with the said plan, and under and by virtue and according to the true intent and meaning of the said standing orders, whereby it was made to appear who were the respective owners, and who the respective occupiers, of the several portions of land so marked and numbered respectively; and by the said numbers and books of reference it appeared, as the fact was, that the plaintiff was the owner and occupier of the parcel of land marked with the number 6 on the said plan, and was also the occupier of the parcels of land severally marked with the numbers 9, 10, 12, 13, and 16, and which plan and book of reference were the plan and book of reference referred to in the said first-mentioned act of parliament in

that behalf: that, after the passing of the said first-mentioned act of parliament, by a certain indenture made between the plaintiff of the one part, and the defendants of the other part, and sealed with the seal of the defendants, they the defendants covenanted with the plaintiff, that, if the defendants, in making the said railway, should cause the same to deviate from the said line so marked and delineated on the said plan by the said centre line, and should make their said railway otherwise than in the said last-mentioned line, but within the said limits of deviation, and if, at the time of the making of the said railway in the \*754] said deviated line, the \*defendants should be bound to carry the said railway through so much of the said deviated ground as should pass between the dotted lines CD. and EF. marked on the said plan opposite to the spot indicated on the said plan by the words and figures "Tunnel, 374 yards," by means of a tunnel, then the defendants would carry so much of the said deviating line between the said dotted lines by means of a tunnel: that, after the making of the said indenture, the defendants made the said railway, and, in so making the same, caused the said railway to deviate from the said line so marked and delineated by the said centre line, and made the same otherwise than in the said last-mentioned line, but within the said limits of deviation, that is to say, in the course or line marked and delineated on the said plan by the blue line on the said plan: that the defendants at the time of their said making of the said railway in the said deviated line, were bound to carry so much of the said deviated line as passed between the said dotted lines, that is to say, so much of the said line marked in blue as lies between the letters A. and B. marked on the said plan, by means of a tunnel as aforesaid: yet the defendants, contrary to their said covenant, had carried and made so much of the said deviating line of railway as passed between the said dotted lines, that is to say, the said part between the letters A. and B., otherwise than by a tunnel, &c.

Pleas,—first, that it was not agreed by and between the plaintiff of the one part and the said provisional committee of the other part, in manner and form as in the first count alleged,—secondly, that, at the time of their said making of the said railway in the said deviated line, the defendants were not bound to carry so much of the deviated line as is described in the second count, by means of a tunnel, in manner and form as in the said second count alleged, &c.

\*755] The cause was tried before Jervis, C. J., at the sittings \*at Guildhall after last term, when a verdict was found for the plaintiff on all the issues joined on the pleas to the second count, and for the defendants as to the rest,—with liberty to the defendants to move to enter the verdict for them on the issues found against them.

The question was, whether, upon the true construction of the 13th

and 15th sections of the Lands Clauses Consolidation Act, 1845,—8 & 9 Vict. c. 20,—the company were bound to make a tunnel at the spot indicated on the plan, they having so deviated, that, from the nature of the soil, and the depth of cutting, it was impossible to make a “tunnel,” in the ordinary sense, though they might have constructed an underground way by what is called “cut and cover.”

*Bramwell*, on a former day in this term, obtained a rule nisi to enter the verdict for the defendants, pursuant to the leave reserved to him at the trial.

*Crowder, Byles, Serjt., Barstow, and M. A. Shee* now showed cause.—The question is, whether, after their notice and plans proposing that their railway shall pass through the plaintiff's land by means of a tunnel, the company can, because they choose to deviate from the line proposed, substitute an open cutting for a tunnel. This question turns upon the 13th and 15th sections of the 8 & 9 Vict. c. 20. The 13th section enacts, that, “where, in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and, where a tunnel is marked on the said plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made, shall consent that the same shall not be so made.” [\*756

\*And s. 15 enacts that “it shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon, than ten yards, or elsewhere to a greater extent than one hundred yards from the said line, and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special act provided for in cases of unintentional errors in the said books of reference.” The 13th section is to be construed without reference to the deviation clause: and a “cut and cover” is clearly a “tunnel” within the meaning of that section. [MAULE, J.—This act is not intended to apply to all possible cases. Whether a tunnel can be made or not, depends upon the nature of the country. It is therefore a fit subject for legislation in each particular case.] There is no provision as to tunnels in the special act, 9 & 10 Vict. c. ccciii. The tunnel clause in the general act is introduced for the protection of landowners. [MAULE, J.—It may be, that, where there is to be a tunnel, the company shall have no power to deviate.] The language of s. 13 is express,—where



a tunnel is marked on the plan, there a tunnel shall be made. The 15th section restricts the company from deviating more than one hundred yards; but it may be, that, in the case of a tunnel, the legislature did not intend to permit *any* deviation. [MAULE, J.—A tunnel is a very special kind of word: the legislature puts it in the same predicament with *\*viaducts*. It might have been intended, as to \*757] structures of that sort, that the landowners were to have a specific warning where they are to be made. JERVIS, C. J.—The *viaduct* must be in the place indicated, unless the special act provides otherwise: it is the position of the *tunnel* only that may be varied by consent.] Where the company undertake to make a tunnel of 374 yards, they do not perform their engagement by making a tunnel of 200 yards long, and 174 yards of open cutting, thus depriving the owner of a portion of the surface. The legislature evidently intended that tunnels and other such engineering works that are essential to the convenience of the landowner, shall be constructed precisely on the spot indicated on the plan. [MAULE, J.—Under s. 13, the company are bound to make the tunnel on the spot designated. But by s. 14, it is provided that “it shall not be lawful for the company to deviate from or alter the gradients, curves, *tunnels*, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions, that is to say” (amongst others),—“It shall be lawful for the company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by a certificate from the board of trade.”] When this question was before Vice-Chancellor Parker, he did not decide that the 13th section of the act deprived the company altogether of the right to deviate; but that the power of deviation under s. 15, did not dispense with the making of a tunnel. [MAULE, J.—In that we agree with him.] No object is to be gained by a construction so strict as is insisted upon by the other side.

*Bramwell* and Sir *T. Phillips*, in support of the rule, were stopped by the court.

\*JERVIS, C. J.—The question which arises upon the record in \*758] this case, is, whether, upon a line of railway which is not the line originally marked out, but is within the limits of deviation, a deviation can properly be allowed at a place where a tunnel is shown upon the plan. I am of opinion that it cannot. That question necessarily arises here; for, if the company cannot deviate where a tunnel is marked, deviating, they cannot be bound to make a tunnel. In the reason and justice of the thing, there can be no objection to this construction of the act, which the words of the 13th and 15th sections plainly warrant; for, the arches or viaducts and tunnels mentioned in the 13th section, and in respect of which there is a specific restriction in s. 14, are matters of great importance as well to the public as to the railway pro-

prietors, and could not be expected to be provided for in a general act applicable to all railways hereafter to be constructed, but would naturally be left to be the subject of special contracts between the company and the parties immediately interested, or of specific enactment in the special act of parliament. It is the proper province of the special act to provide for the peculiar circumstances of its own line. There is nothing in the general act, or in the subject-matter it is dealing with, which calls for a construction other than is strictly and properly warranted by the language used in it. Upon those words we are bound to put a fair and reasonable construction, not straining or varying them to meet a supposed intention. The 13th section is remarkable, as drawing a distinction between viaducts and tunnels. In substance, it provides, that, where a viaduct is marked on the plan, there a viaduct shall be made; and that, where a tunnel is marked on the plan, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land consent that it shall not be made. The plain meaning is, that, where a tunnel is marked, there \*it shall be made,—not within the line of deviation, but *there*, at the place where it is [\*759 marked on the plan. That that is the fair meaning of the 13th section, nobody reading the 14th can reasonably doubt; for, that section provides that it shall not be lawful for the company to deviate or alter a tunnel shown on the plan, except under circumstances and upon conditions which do not apply here. It is impossible to say a tunnel is not deviated or altered, if by deviating the line the position of the tunnel is altered. It is plain, therefore, to my mind, that, where a tunnel is marked on the plan, there can be no deviation. If that be so, the 15th section must be read consistently with that construction, thus,—It shall be lawful for the company to deviate from the line shown upon the plan, within certain limits, except where a tunnel is shown, and in that case the tunnel shall be made as marked on the plan. That construction makes the 13th, 14th, and 15th sections form one comprehensive and intelligible system; providing, that, where a viaduct or a tunnel is shown, there they shall be placed; but that, subject to that provision, the company may deviate the line within the limits allowed and marked on the plan. No injustice is done to any one by the construction which I think the words compel us to put upon the statute. It imposes no hardship on the company, who may provide for any deviation which may be necessary in their special act; and none upon the owner, lessee, or occupier, who gets precisely what he has a right to. The result will be, that the issue in this case is not proved, and that the rule for entering the verdict for the defendants must be made absolute.

MAULE, J.—I am of the same opinion. In determining this case, we are not to put any nice construction upon the words of the act; but I think our decision in favour of the defendants is quite consistent

\*760] with giving \*the words used their plain and natural meaning; and that, in coming to that conclusion, we shall not be in any respect interfering with, but, on the contrary, shall only be promoting, that which is the general scope and intention of the act. The 8 & 9 Vict. c. 20, does not profess in all respects to make provisions as to all railways. That would have been impossible; because each railway must have its own local peculiarities, which could not well be made the subject of any general legislative provision. But, notwithstanding that that is so, there are many matters which are common to almost all railways; and, as to these, the statute seems to be a very salutary one in many respects. It shortens the length, and thereby and otherwise very materially diminishes the trouble and the expense of preparing and passing local acts; and it makes the general rules respecting railways, and the decisions thereon, more uniform, and more easy of application. The main scope of the act is, to make some general regulations which shall govern all railways, and to leave things that are the fit subjects for local provision, to be dealt with by the local acts. Tunnels and viaducts, and such like engineering works, are manifestly most unfit subjects for general regulation, and can only be adequately dealt with by local and special provisions. Accordingly, we find in the general act certain general regulations which in themselves are plain and simple, presenting no complication or difficulty. The 13th section enacts, that, "where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land on which such tunnel is intended to be made, shall consent that the same shall not be made." The tunnel must be made at the spot indicated. The 14th section throws light upon that, if any were wanted: \*761] it says, that the company shall \*not deviate or alter a tunnel shown on the plan, except under certain circumstances and upon certain conditions which have no application to the present case. Where a tunnel is marked, there a tunnel must be made, unless otherwise provided for by contract or by the special act. Giving that meaning to the words, it is clear that the power of deviating given by the 15th section, would be contradictory to the provisions contained in the 13th and 14th sections, unless it is to be understood as not applying to tunnels and engineering works. Such works the company are bound to construct in the manner and at the place shown in the original plan; and they have no power to deviate at all. The question then is, whether, supposing the defendants in this case had no power to deviate, as they have done here, a duty is cast upon them to make a tunnel in the deviated line. If the legislature has not given them the *power* to make a tunnel there, it is clear they have not imposed upon them the *duty* to do so. In omitting to make a tunnel at the spot where a tunnel was marked on the plan, the company have done something of which the

plaintiff undoubtedly has a right to complain. But the commission of that wrong does not impose upon them a duty to make a tunnel elsewhere. It seems to me to be very clear, construing the act according to its words, and according to the spirit of it, and the purpose for which it was passed, the company had no power to deviate or vary from the line laid down in their plan, so as to make it not pass through a tunnel at the spot where a tunnel was marked to be made; but that the wrong they have done in so deviating as to make that impossible, does not impose upon them the obligation of making a tunnel in the substituted line. For these reasons, I concur with my Lord Chief Justice in thinking that the defendants are entitled to have this rule made absolute.

WILLIAMS, J.—I am entirely of the same opinion. \*Apply- [\*762 ing the ordinary rules of construction to the language of the 13th, 14th, and 15th sections of the statute, I think it is impossible to come to any other conclusion than that to which my Lord and my Brother Maule have come.

TALFOURD, J.—I concur with the rest of the court, and for the reasons already given at sufficient length. Rule absolute.

### FISHER v. RONALDS. Nov. 23.

A witness is not bound to answer a question, where his answer may have a tendency to render him amenable to a criminal charge: and it is no ground of complaint that the judge cautions the witness, without waiting for him to claim his privilege.

And, *semble*, that it is for the witness, and not for the judge, to determine whether or not the answer to the question may tend to criminate him.

ASSUMPSIT on a bill of exchange for 245*l.* drawn by one Chappell upon and excepted by the defendant, and endorsed by Chappell to the plaintiff.

Plea, amongst others, that the bill declared upon was accepted by the defendant for the purpose of securing to Chappell, the drawer, a sum of money won by him of the defendant by gaming, contrary to the statute; and that the bill was endorsed to the plaintiff with full knowledge of the circumstances under which it was given.

The cause was tried before Cresswell, J., at the second sitting in London in this term.

It appeared that the defendant was an officer of the 77th regiment, stationed at Plymouth; that, during the Plymouth races, in August, 1851, certain persons calling themselves "The Bath and Bristol Club," of whom Chappel was one, went down to Plymouth; that a room was hired for them there at the house of one John Hix, a livery-stable keeper, where roulette was played, and Ronalds, the defendant, was a

considerable loser. The defence attempted to be set up, was, that the bill in question was given by the defendant for part of the money so lost by him to Chappell.

\*763] \*To prove this, Hix was called. He said he knew a set of persons called "The Bath and Bristol Club;" that, in August, 1851, he was applied to by some officers of the 77th, to let them a room; that some of the members of the club, among whom was Chappell, came there; that he was in the room on the night the money was alleged to have been lost by the defendant; that he saw the defendant there; but that he saw no gaming. He was then asked, "Was there a roulette-table in the room?" *Byles*, Serjt., for the plaintiff, interposed, and asked the learned judge to caution the witness, that his answer to that question might tend to subject him to a criminal charge under the 8 & 9 Vict. c. 109, ss. 1, 2.(a) The learned judge, after looking at the statute, told the witness that he was not bound to answer the question, inasmuch as his answer might have a tendency to involve \*764] him in the \*danger of being indicted as the keeper of a common gambling-house, or as a conspirator to defraud.

The witness accordingly declined to answer the question: and a verdict was found for the plaintiff, for the amount claimed.

*Montagu Chambers* (with whom was *Collier*) now moved for a new trial.—The learned judge was wrong in telling the witness that he might decline to answer the question, on the ground that it might have a tendency to criminate him. After the statement he had already made, that he saw no gambling, his answer to the particular question one way or the other could not in any degree criminate him, or place him in any danger of an indictment, under the statute, or otherwise; and therefore he was bound to answer it. It is no part of the duty of the judge to caution a witness, until the latter claims his privilege. [MAULE, J.—In *Lord Cadogan's Case*, *Gurney's Report*, p. 79, the witnesses were cautioned before they claimed their privilege. I do not know that a judge would do wrong if he were to caution a witness before

(a) The first section,—reciting that "the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise,"—repeals certain parts of the 33 H. 8, c. 9.

Sect. 2 recites that "doubts have arisen whether certain houses alleged or reputed to be opened for the use of subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming-houses;" and declares and enacts, "that, in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law and forbidden to be kept by the said act of King Henry the Eighth, and by all other acts containing any provision against unlawful games or gaming-houses."

every answer. The witness here did not say that he did not know that gambling was going on in the room.] If he had seen the table, and had even seen it used, it by no means follows that he would be liable to any indictment. [MAULE, J.—We cannot say that. The witness might be conscious that there was evidence against him, which his answer might render complete.] Enough had not come out to make the question objectionable. [MAULE, J.—In *The Queen v. Garbett*, 2 Car. & K. 474 (E. C. L. R. vol. 61), 1 Denison's C. C. 236, before the fifteen judges, it was urged that the witness had not claimed his privilege soon enough: but the majority of them were of opinion that the claim might be made at any stage of the inquiry. The question in this case had a clear and obvious \*tendency to criminate the witness.] Is it a crime to let a room where people gamble? [MAULE, J.—Yes, [\*765 if it is let with a knowledge of the use which is intended to be made of it.] At all events, the judge is to exercise his discretion as to whether or not the claim of privilege is well founded. [MAULE, J.—No: it is the witness who is to exercise his discretion, not the judge. The witness might be asked, "Were you in London on such a day?" and, though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.] If the rule upon this subject is to be so much relaxed as is suggested, it will be impossible in many cases to get evidence at all. The party has no remedy against the witness for refusing to answer; and the court, it seems, is bound by his statement that the question places him in danger of criminating himself. [MAULE, J.—The rule is of considerable antiquity; and I am not aware that any great practical inconvenience has been found to result from it. I think you must contend here, that the witness's answer could not possibly place him in jeopardy, before you can say that the judge was wrong in refusing to compel him to give it.] It could hardly be necessary to carry the argument to that length; and, if it were, the facts would warrant it.

JERVIS, C. J.—I am of opinion that my Brother Cresswell was quite right in declining to compel the witness to answer the question. The tendency of the question was plain: and the learned judge saw that the witness really believed that his answer to it might tend \*to criminate him. In *Phillips on Evidence*, 10th edit. Vol. II., [\*766 p. 487, it is said that a witness is privileged from answering not only what will criminate him directly, but also whatever has any tendency to criminate him: and the reason given for this decisively disposes of this case,—“because, otherwise, question might be put after question,

and, though no single question may be asked which directly criminate, yet enough might be got from him by successive questions, whereon to found against him a criminal charge." We must, therefore, allow the witness to judge for himself, or he would be made to criminate himself entirely. There is, no doubt, at times great difficulty in applying the rule; but it is impossible to help that.

MAULE, J.—I am of the same opinion. We need not decide upon the present occasion, that the statement of the witness is conclusive, though I think the judge is bound by the witness's oath; otherwise, you might exhaust all possibilities consistent with a man's innocence, and so convict him even of murder. The question here put is just one of the questions which would necessarily have been asked on an indictment against the witness for keeping a gambling-house. I think it is impossible to put a case of the more proper application of the rule which protects a witness from criminating himself.

WILLIAMS, J.—I am of the same opinion. It is unnecessary to determine whether the witness's statement that his answer may tend to criminate him, is conclusive or not. I think it was abundantly clear that his answer in this case must have a direct tendency to place the witness in danger.

TALFOURD, J., concurred.

Rule refused.

A question may be put to a witness though the answer to it may criminate or disgrace him, but the witness is not bound to answer. It is the privilege of the witness to refuse to answer the question, and he may waive the privilege if he thinks proper: *Fries v. Brugler*, 7 Halsted, 79; *Southard v. Rexford*, 6 Cowen, 264; *Chamberlin v. Willson*, 12 Vermont, 491; *Amherst v. Hollis*, 9 New Hamp. 107; *The People v. Bodine*, 1 Denio, 281; *Short v. The State*, 4 Harrington, 568.

And the Court should inform him that he is not bound to answer: *Southard v. Rexford*, 6 Cowen, 264. But see *Commonwealth v. Shaw*, 4 Cushing, 594.

The witness and not the Court is to judge whether the answer to a question may tend to criminate him: *State v. Edwards*, 2 Nott & M'Cord, 13; *Poole v. Perritt*, 1 Spears, 123; *Warne v. Lucas*, 10 Ohio, 336. But see *Richman v. The State*, 2 Greene, 532.

\*767]

\*Ex parte WILLIAM STORY. Nov. 8.

Prohibition to the spiritual court lies only where that court is proceeding in a matter which is clearly out of its jurisdiction, or in a manner that is manifestly contrary to the general principles of justice.

A. was cited to appear, and did appear, in the Consistorial Court, in a suit promoted against him by his wife, for restitution of conjugal rights. In the course of that suit, two orders were made, decreeing restitution, and alimony pendente lite,—for disobedience of which A. was about to be pronounced in contempt:—Held, that, inasmuch as A. had once appeared, this court could not pronounce the giving of judgment against him in his absence, and without previous notice thereof to him, a proceeding without jurisdiction, or contrary to justice.

PARRY, on a former day in this term, moved for a rule to show cause why a writ should not issue to the Bishop of London, the judge and other officers of his Consistorial Court, and to Elizabeth Story, the

party promoting a certain cause in that court, prohibiting them from further proceeding therein, or from further proceeding in the matter of two monitions alleged to have been decreed on or about the 9th of June last.

The motion was founded upon the affidavit of William Story, who deposed as follows:—That, on the 1st of August, 1850, he was cited to appear (personally or by his proctor) before Dr. Lushington, the judge of the Consistorial Court of the Bishop of London, to answer to Elizabeth Story, his wife, in a suit alleged to be brought against him by her, for restitution of conjugal rights: that, in pursuance of and in obedience to such citation, he personally attended before the judge of the Consistorial Court, and alleged, as the fact was, that the said Elizabeth Story in March, 1849, abandoned his home, and also, as the fact was, that the said Elizabeth Story was before and at the time of the commencement of the said suit, and still remained, in apartments provided for her, and maintained by and at the expense of the deponent: that he made ample provision for her support: that the deponent thereupon objected that the court had no jurisdiction further to entertain the said suit against him, and prayed the judge to dismiss the same, but which the judge refused to do: that the deponent thereupon prayed the judge to grant him leave to bring in evidence of \*malicious, adulterous, [\*768 and cruel conduct of his wife: that, on the 26th of April, 1852, the deponent received the following notice from Mr. Crickitt, his wife's proctor:—

“Doctors' Commons, April 26, 1852.

“Sir,—I hereby give you notice, that, on the next court day, the 30th instant, I intend to move the judge to make his order upon you to take your wife home, and treat her with conjugal affection, and to certify that you have done so by the following court day. I shall also move the judge to pronounce you in contempt for not having obeyed the two monitions served on you for the alimony now due to Mrs. Story, and that the same may be signified.”

That, in pursuance of this notice, the deponent attended before the judge, when an application was made by an advocate in the presence of one Wadeson, Crickitt's partner, to pronounce the deponent in contempt for non-payment of alimony, and that the first motion therein was abandoned and omitted to be made, whereupon the deponent called upon the advocate and upon Wadeson to make the motion in accordance with the terms of the notice, and also called upon the judge to entertain the motion in the order and priority set forth in the notice, or to dismiss the suit; whereupon the judge stated that he could not interfere, and closed the case for that day: that, on the 11th of May last, Wadeson again applied to the judge to pronounce deponent in contempt for non-payment of the alleged alimony, and that the judge said, that, unless the deponent immediately paid the said alimony and costs, he



would pronounce him in contempt; whereupon he paid to the registrar, under protest, the sum demanded of him, amounting to 41*l.* 14*s.* 4*d.*: that, on the 2d of September last, the deponent was served with a copy of two monitions, as follows:—

\*769] “Charles James, by Divine permission, Bishop of \*London, to all and singular clerks and literate persons whomsoever and wheresoever, in and throughout our whole diocese of London, greeting: Whereas the Right Hon. Stephen Lushington, doctor of laws, our vicar general, and official principal of our Consistorial and Episcopal Court of London, rightly and duly proceeding in a certain cause or business of restitution of conjugal rights, between Elizabeth Story, wife of William Story, the party promoting the same, on the one part, and the said William Story, her lawful husband, of, &c., in the city of London, and our diocese of London, the party against whom the same is promoted, on the other part, at the petition of the proctor of the said Elizabeth Story, in pain of the contumacy of the said William Story, thrice called, and in nowise appearing, Hath decreed the said William Story to be monished and cited in manner and form and to the effect hereinafter mentioned (justice so requiring): We do, therefore, hereby authorize, empower, and strictly enjoin and command you jointly and severally, peremptorily to monish and cite, or cause to be monished and cited, the said William Story, by showing to him these presents under seal, and by leaving with him a true copy hereof, whom we do also, by the tenor of these presents so monish and cite, that he do receive his wife, the said Elizabeth Story, and treat her with conjugal kindness, and certify his having done so to our said vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, on the 15th day after the service of these presents as aforesaid, if it be a general session bye-day, extra or additional court day of our said court, otherwise, on the general session bye-day, extra or additional court day of our said court then next ensuing, under pain of the law, and contempt thereof: And what you shall do or cause to be done in the premises, you shall duly certify our vicar-general and official principal aforesaid, his \*770] surrogate, or some other competent judge in this behalf, \*together with these presents. Dated at London, this 25th day of June, in the year of our Lord 1852, and in the 24th year of our translation.

(Signed)

“JOHN SHEPHARD,  
“Deputy Registrar.”

The second monition was as follows:—

“Charles James, by Divine Providence, Bishop of London, to all and singular clerks and literate persons whomsoever and wheresoever, in and throughout our whole diocese of London, Greeting: Whereas, the Right Hon. Stephen Lushington, doctor of laws, our vicar-general and official principal of our Consistorial and Episcopal Court of London, lawfully constituted, rightly and duly proceeding in a certain cause or business

of restitution of conjugal rights, now depending before him in judgment, between Elizabeth Story (wife of William Story), the party promoting the same, on the one part, and the said William Story, of, &c., in the city of London, and our diocese, the party against whom the same is promoted, on the other part, on the fourth session of Hilary Term, to wit, Thursday, the 13th day of February, 1851, did allot to the said Elizabeth Story the sum of 50*l.* per annum as alimony pending suit, to commence from the return of the citation, and to be paid quarterly, but deducting therefrom such sum or sums of money as might have been paid or advanced to the said Elizabeth Story since that period: And whereas, on the 2d session of Trinity Term, to wit, Wednesday, the 9th day of June instant, our vicar-general and official principal aforesaid, at the petition of the proctor of the said Elizabeth Story, alleging that one quarter of the said alimony, amounting to the sum of 12*l.* 10*s.*, had on the 2d day of the present month become due and payable to the said Elizabeth Story, did decree the said William Story to be monished and cited in manner and form and to the effect hereinafter mentioned (justice so requiring): We do, \*therefore, hereby authorize, empower, and strictly enjoin and command you jointly and severally peremptorily to monish and cite, or cause to be monished and cited, the said William Story, whom we do so monish by the tenor of these presents, to pay or cause to be paid to the said Elizabeth Story, or to her proctor in the said cause, the said sum of 12*l.* 10*s.* of lawful money of Great Britain, together with the expense of this monition, and the service hereof, within fifteen days after he shall have been served herewith, under pain of the law, and contempt thereof: And what you shall do or cause to be done in the premises, you shall duly certify our vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated, at London, this 25th day of June, in the year of our Lord 1852, and in the 24th year of our translation.

(Signed)

"JOHN SHEPHARD,

"Deputy Registrar."

The affidavit then went on to state, that the said monitions alleged to be decreed on the 9th of June last, and so served as aforesaid upon the deponent on the 2d of September last, *were made and decreed in his absence, and without any previous notice, citation, or summons to him whatever*; and the deponent was entirely ignorant that any such decree or monition was about to be made, or was made against him, until served with the said notice of the 2d of September: that the deponent had searched the book containing the minutes and assignments of the said court, kept in the office of the registrar, and found an entry therein of the minute of a decree in the following words:—"9th June, 1852. In pain of William Story therein called, and not appearing, the judge, at petition of Wadeson, for Crickitt, decreed a monition to issue monishing him the said William Story to receive his

\*772] wife home, and treat her with conjugal \*kindness; and also a monition for further alimony:" that the deponent's said wife had not, either on the 9th of June last, or at any other time since then, either by herself, her proctor, or by any other person on her behalf, offered to return to his home; and deponent verily believed that her said proctors were colluding with her for the purpose of preventing the deponent from taking her home, and, by securing the payment of alimony, virtually depriving him of the lawful control of his wife; and that the deponent was, on the 4th of November instant, served with the following notice, signed by Crickitt:—

"Doctor's Commons, 4th Nov. 1852.

"Sir,—I beg to give you notice, that, unless you obey the monitions served upon you, by taking your wife home, and treating her with conjugal affection, and certifying that you have done so, on the next court day, and also by paying the alimony and costs set forth in the said monition, on or before Monday, the 8th instant, I shall, on the next court day, to wit, Tuesday, the 9th instant, move the court to pronounce you in contempt, and that the same may be signified."

The court,—suggesting that possibly there might have been some failure of practice that would afford Mr. Story ground to apply to the ecclesiastical court to set aside the proceedings,—recommended that such an application should be made, and the matter, if necessary, mentioned again.

*Parry* (with whom was *Ribton*) now renewed his motion, upon a further affidavit of Mr. Story, which stated, that the deponent attended before the judge of the Consistorial Court, on the 9th instant, when Crickitt moved the judge that the deponent be pronounced in contempt for not obeying the monitions and decrees alleged to have been made on the 9th of June last: that the \*deponent thereupon protested \*778] against the said judge proceeding further in the matter of the said cause, by reason of his never having received any notice that the orders or decrees were about to be made, or any summons requiring his attendance when the same were so to be made or pronounced: that the deponent then tendered an affidavit setting forth the facts, and applied to be sworn thereto, which the judge refused, addressing the deponent in substance as follows:—"I will not now pronounce you in contempt for not obeying the orders in question, as, if I do, I must signify the same to the Lord Chancellor, and then the matter is out of my hands: I will allow you until the next court day to comply with the orders of the court; and, if you have not then done so, I shall pronounce you in contempt:" that the judge declined to hear the deponent any further to give evidence, which he was prepared to do, to show that the orders, monitions, and decrees in question were made in his absence, and without any notice whatever having been given to him, and without his knowledge: and that the deponent verily believed that the judge would

pronounce him in contempt on the next court day, unless the court interposed.

Prohibition lies to restrain the ecclesiastical court from proceeding in a matter in which it has no jurisdiction, or where it exceeds its jurisdiction, or where it proceeds in a manner which is contrary to the general law of the land or to natural justice. In *Ex parte Smyth*, 3 Ad. & E. 724 (E. C. L. R. vol. 30), Littledale, J., says: "The only instances in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court." The motion of the 9th of June, 1852, is a judicial act,—a judgment against Story in his absence; which is contrary to the general law of the land. In *Ex parte Kinning*, though there was some difference of opinion amongst the judges of the Court of Queen's Bench (10 Q. B. 730, (E. C. L. R. vol. 59),) [\*774 this court were unanimously of opinion, that, where the judge of an inferior court of record (under the 8 & 9 Vict. c. 127, s. 1), had, upon proof of the ability of the debtor, made an order simpliciter for the payment of the debt by instalments, he could not, after default made, grant a warrant of imprisonment, without giving the debtor an opportunity of being heard against the granting of such warrant,—4 C. B. 507 (E. C. L. R. vol. 56). [MAULE, J.—The ground of our decision there was, that the commitment is a penal process, not a satisfaction of a debt, like a *ca. sa.*, which the party may himself issue; and that it is contrary to natural justice that a man should be judged without giving him an opportunity of being heard, the judge having a discretion to exercise. That certainly is a very different case from this. The difficulty I feel is this,—there may be some practice in the ecclesiastical court, to make it the business of a party who has been once duly summoned, to be present in court, by himself or his proctor, on all juridical days, without any special notice. If that be so, the objection as to the proceeding being contrary to natural justice, does not arise.] The court will not assume that such a practice, which would be manifestly contrary to the general law, exists. [MAULE, J.—I see nothing so repugnant to natural justice in supposing that a party who has once appeared by a proctor,—who certainly is a person having more full authority than any other description of agent that I know of,—may be considered as always in court.] In *Capel v. Child*, 2 C. & J. 558,† a bishop issued a requisition under the 57 G. 3, c. 99, s. 50, requiring the vicar of W. to nominate a curate with a stipend, on the ground that, it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of W. were inadequately performed, by reason of the vicar's negligence. \*The vicar appointed no curate, and did not appeal to the archbishop. The bishop, after three months, licensed the Rev. A. [\*775 B., clerk, as curate of W., with a stipend. The vicar refused to allow

A. B. to officiate; upon which the bishop issued a mandate or summons to show cause why the vicar should not pay the stipend due, and ultimately proceeded to sequestration. It was held, that the requisition, upon which the whole of the proceedings were founded, was in the nature of a judgment, and void, as the party had no opportunity of being heard. Lord Lyndhurst there says: "A power is given to the bishop to pronounce a judgment; and, according to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained unless the party in the first instance had the opportunity of being heard in his defence." [MAULE, J.—There, the requisition complained of was made without Mr. Capel's knowing anything about the matter. That is not the case here: it is not pretended that Mr. Story was not originally duly summoned. What he complains of, is, this further step in the suit, which was taken without any special notice to him.] The complaint is, that a judgment is pronounced against him, without his having had an opportunity of defending himself. [MAULE, J.—Is that so, where the party has been once properly and regularly brought into court?] If such a rule as is suggested prevailed in the ecclesiastical court, it clearly would be bad, as being contrary to the common law of England. [MAULE, J.—Certainly not. In the case of *Capel v. Child*, the Court of Exchequer had the whole proceedings before them. Here, we have not. The requisition to the vicar to nominate a curate there, was the foundation and beginning of the proceedings: here, none of the proceedings are shown, except the particular one which is complained of. Mr. Story \*776] was cited, and he appeared. \*How, then, can we infer that a subsequent proceeding is one that he had not an opportunity of appearing to and resisting? In the case cited, Mr. Capel was not brought into court at all before the judgment was pronounced against him; the judgment was pronounced by the bishop under an impression that he might act upon his own knowledge, against a person who had never been cited or summoned to appear and defend himself.] This monition was a fresh proceeding: upon every principle of justice and equity, the party should have been heard: *Harper v. Carr*, 7 T. R. 270. [MAULE, J.—That case would have been to the purpose, if Story had never been cited at all.] It is universally held to be contrary to natural justice, that a decree or judgment should be pronounced in the absence of the party to be affected by it.

MAULE, J.(a)—I am of opinion that there ought to be no rule in this case. It appears that a suit for restitution of conjugal rights had been duly instituted by Mrs. Story against her husband, in a court of competent jurisdiction, and that a judgment had been pronounced by that court which that court was competent to pronounce. Mr. Story now complains that he had no notice that judgment was about to be pronounced; and it is said, that in consequence of the want of such notice,

(a) *Jervis, C. J., and Crosswell, J., were sitting in the Court of Criminal Appeal.*

the judgment is a proceeding contrary to natural justice, and therefore a prohibition ought to issue. But I do not find that the courts at Westminster have ever interfered by issuing a prohibition in a case so circumstanced. Where, as in the case of *Capel v. Child*,—which was in substance and effect the same as *Ex parte Kinning*,—the ecclesiastical court is proceeding against a person who has never been called into it at all, it is proceeding in a manner that is contrary to \*natural justice, and this court may prohibit. Here, however, [\*777 Mr. Story was regularly cited to appear in the Consistorial Court, in a suit for restitution of conjugal rights. He does not deny that he was properly brought into court: but he says he had not notice of the time and place of giving judgment therein. I do not see that natural justice requires anything of the sort. That being so, I must intend that the ecclesiastical court, in proceeding as it did, was proceeding according to its ordinary course and practice. When a prohibition is applied for, the applicant must show clearly that the court to be prohibited is proceeding improperly, that is, without jurisdiction, or in a manner that is opposed to the principles of justice; it is not enough to leave it to inference and conjecture. Mr. Story does not show here that the proceeding against him is one of that description. It may be, and I think it appears, that he had sufficient opportunity of defending himself. There was a case, I think, from the *Mauritius*, where the proceeding against the defendant in absence, and without any sort of warning, was held to be untenable: but that is a very different case from this. In the absence, therefore, of all authority for it, I do not think we ought to grant a rule.

TALFOURD, J.—I also think Mr. Parry has failed to lay before us sufficient ground for a rule. The general doctrine is well known, that prohibition is never granted where the court sought to be affected by it has clear jurisdiction, unless it is proceeding in a manner contrary to the principles (not the *rules*) of the common law. In *Comyns's Digest, Prohibition* (G. 22), it is laid down, that, “where the spiritual court has cognisance and jurisdiction of the matter, a prohibition shall not be granted, though the proceeding there differs from the rules of the common law:” and several instances are given. \*There might have been ground of complaint here, if the ecclesiastical court assumed [\*778 to pronounce a judgment against a party who had never been cited. But it may be perfectly in accordance with the practice of that court, that, where a man has been duly cited, and has once appeared, he is assumed to have notice of the various steps in the suit, and is bound, by himself, or his proctor, to be in court when the judgment is pronounced. It is no part of the duty of this court to inquire into the propriety of the practice of the ecclesiastical court.

Rule refused.(a)

(a) See *Bartlett, Clerk, v. Kirkwood*, 18 Jurist, 173.

## ROBERTS v. BETHELL. Nov. 16.

*Assumpsit* by endorsee against acceptor on six bills of exchange, five of which became due on or before the 5th of February, and one on the 12th of March, 1851. Plea, that the defendant was an infant at the time of accepting the bills. Issue being joined upon the replication to this plea, it was proved, that the drawer, the acceptor, and the endorsee, all resided in London, and that the defendant attained his majority on the 11th of March, 1851:—Held, that, upon this evidence, the jury were warranted in finding that the bills were accepted by the defendant whilst he was an infant,—a bill of exchange, in the absence of proof to the contrary, being presumably accepted within a reasonable time after its date, and before its maturity.

*ASSUMPSIT* by the endorsee against the acceptor of certain bills of exchange.

The first count of the declaration stated, that one William Miller, on the 2d of November, 1850, made his bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the said William Miller or order the sum of 90*l.* for value received, three months after the date thereof, which period had elapsed, and the said bill had become due, before the commencement of this suit; and the defendant then accepted the said bill; and the said William Miller then endorsed the same to the plaintiff,—of all which the defendant then had notice, and then promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof; but that the defendant did not pay the said bill, or any \*779] part \*thereof, when the same became payable, according to the tenor and effect thereof.

There were five other counts upon five several bills of various amounts similarly drawn, accepted, and endorsed, four of them bearing date the 23d of November, 1850, and payable three months after date, and one (for 20*l.*) at four months after date, drawn on the 9th of November, 1850.

The declaration also contained the common money counts, and a count upon an account stated.

To the counts on the bills, the defendant pleaded,—first, that he did not accept,—secondly, infancy; and to the common counts, non *assumpsit*, and infancy.

Replication to the plea of infancy,—that the defendant was of full age when he accepted the bills; without this that he accepted the said bills, or any of them, whilst he was within the age of twenty-one years. Issue thereon.

The cause was tried before Williams, J., at the sittings at Westminster, after last Trinity Term. The plaintiff put in the bills, and proved the defendant's handwriting. The several dates thereof were those alleged in the declaration.

To prove the defendant's infancy, his father was called, who stated that his son attained the age of twenty-one on the 11th of March, 1851, which was one day before the last of the bills became due.

It appeared that the bills were drawn in London, and that the defendant, as well as the drawer and the endorsee, resided in London.

For the plaintiff it was submitted, that, inasmuch as a bill may be accepted after it has arrived at maturity, the defendant was bound, in order to sustain his plea of infancy, to show when he accepted the bills,—the meaning of the allegation of acceptance being, that the defendant accepted at *some* time; and that, as to the last \*bill, [\*780 the case was stronger, as no action could be brought upon it until two days after the defendant had attained his majority.

A verdict was returned for the defendant; leave being reserved to the plaintiff to move to enter a verdict for 370*l.* (the amount of all the bills) and interest, or for 20*l.* and interest.

*Byles*, Serjt., on a former day in this term, obtained a rule nisi accordingly.—He cited *Mitford v. Wallicot*, 1 Salk. 128, 12 Mod. 410, Com. 75 (per nom. *Gregory v. Walcup*), 1 Lord Raym. 574 (per nom. *Mitford v. Walcot*), *Stein v. Yglesias*, 1 C. M. & R. 565,† 5 Tyrwh. 173, 3 Dowl. P. C. 252, *Israel v. Argent* and *Blyth v. Archbold*, *Chitty on Pleading*, by Pearson, 2d edit., p. 330 (b), and *Harrison v. Clifton*, 17 Law Journ. N. S., Exch. 233.

*Edwin James* and *Fortescue*, now showed cause.—The inference drawn by the jury, that the defendant accepted the bills whilst he was an infant, was fully warranted by the evidence. The defendant was not bound to prove that the acceptance took place before the bills arrived at maturity,—or, as to the last bill, that it was accepted before the 12th of March, 1851. *Harrison v. Clifton*, which will be relied on by the other side, was cited in a subsequent case of *Levy v. Bulkeley*, 14 Law Times, 378. There, a bill at four months' date was drawn on the 6th of February, 1849, upon the defendant, who attained the age of twenty-one on the 5th of May in that year; and it was held, that there was abundant evidence, in support of a plea of infancy, to go to the jury, that the bill was drawn and accepted during the defendant's minority. It is always to be presumed, in the absence of evidence to the contrary, that the acceptance takes place before the maturity of \*the bill. The burthen of proving that the acceptance took [\*781 place after the maturity of the bill, it seems, lies on the party who so asserts: see *Byles on Bills*, 6th edit., p. 146, n. (y). [MAULE, J.—Acceptance is proved by proving the acceptor's handwriting; and that proves the date, because it is presumed that it takes place before the bill is due. It is every day's practice to prove the handwriting of the acceptor only; and non constat but that he may have accepted the bill after action brought.] In the absence of evidence to the contrary, a bill of exchange must be taken to have been issued at the time it bears date: *Anderson v. Weston*, 6 N. C. 296, 8 Scott, 583. *Bosanquet, J.*, in giving the judgment of the court, there says: "When a deed is produced, and the execution of the deed is proved by the subscribing wit-



ness, or by accounting for the absence of the subscribing witness by death or otherwise, and proving the signature, and that deed bears a date, as far as my experience goes, that date has uniformly been taken to be *prima facie* evidence that the deed was executed at the time when it purports to bear date. It is the practice, in cross-examination, to inquire whether the deed was executed when it bears date; but I certainly never heard it contended that it was part of the proof of the person producing the instrument, not only to give evidence of the execution of the instrument, but, in the first instance, and before any evidence is offered to render doubtful the time of making the instrument, that it was executed at the time it bears date." No doubt, bills may be accepted after they are due; but that is not the ordinary presumption. The legal effect of an acceptance is very different before and after maturity: in the latter case, the bill is payable on demand: *Jackson v. Pigott*, 1 Ld. Raym. 364, 12 Mod. 212, *Mitford v. Wallcott*, *Christie v. Peart*, 7 M. & W. 491,† 9 Dowl. P. C. 291; and the drawer \*782] is discharged. In declaring \*upon a bill accepted after maturity, the usual course is so to allege the acceptance: *Billing v. Devaux*, 3 M. & G. 565 (E. C. L. R. vol. 42), 4 Scott N. R. 175. [JERVIS, C. J.—How do you pray in aid the declaration?] The plaintiff has no right to put a false statement on the record, and then call upon the defendant to prove it to be false.

*Byles*, Serjt., and *Huddleston*, in support of the rule.—The difficulty cast upon the plaintiff by the suggestion which has been thrown out by Mr. Justice Maule, is, that it is every day's practice, in an action against the acceptor of a bill of exchange, to rest the case simply upon the production of the bill, and proof of the defendant's handwriting, and yet it may be that the acceptance may have taken place after the commencement of the action; and it is asked, what is to prevent that presumption, but the presumption that the acceptance has taken place before the maturity of the bill? That difficulty has never been suggested by any one before. [MAULE, J.—The principle, I apprehend, is this. It is the usual course to date all instruments of the day on which they are executed. So, in the case of bills of exchange, it is presumed that the acceptance takes place shortly after the date of the bill, because that is the natural and usual course of business.] That presumption does not hold universally: it clearly does not apply where a bill is the foundation of a fiat in bankruptcy. [JERVIS, C. J.—That is dealt with as the single exception.] The allegation in the declaration, is, that the defendant accepted the bills at some time before the commencement of the action, either before or after the maturity of the bills. The defendant pleads in confession and avoidance,—true, I accepted the bills, as alleged in the declaration, but at the time I accepted, I was not of full age: and he does not show *when* he accepted. This is an action by endorsee against acceptor:

\*the plaintiff might have been the twentieth endorsee, or he might have been a foreigner: how, then, could *he* show the actual time of acceptance? As against the acceptor, the presumption should be that he was of full age at the time he accepted,—the act of accepting being tantamount to a declaration that he was competent to bind himself by acceptance; otherwise, the acceptance would be a fraud, in foro conscientiæ at least. [MAULE, J.—Suppose you called a witness, who proved that the bill was accepted before its maturity, and the defendant proved that he was an infant at the time the bill became due; in that case, no doubt the defendant would succeed. In what does that case differ from this, except in the quantity or degree of proof?] It does not follow that a presumption which might legitimately be made on one issue, may also be made on another. Upon this issue, the defendant had two things to prove, as to which no presumption can fairly be made in his favour, because they are, or may be, exclusively within his knowledge,—first, when he accepted the bills,—secondly, when he came of age. It has never before been suggested that the presumption which arises on the first issue, helps the defendant on the second. [MAULE, J.—The defendant proves that the bills were accepted before the 11th of March, 1851, if there is evidence whence it may be fairly presumed, as, that the bills arrived at maturity before that day. The form of the issue can make no difference, if the matter sought to be proved is on the issue a question for the jury.] Presumptions as to the time of the happening of events, vary as the issue varies: *Doe d. Knight v. Nepean*, 5 B. & Ad. 86 (E. C. L. R. vol. 27). [MAULE, J.—That is a totally different question.] In *Israel v. Argent*, cor. Lord Abinger, C. B., Exch. 1834, Pearson's Chitty, p. 330, in an action against the defendant as acceptor of a bill, it was ruled, that, the issue being infancy, the defendant was bound to \*prove not only his real age, but also (if not shown to have been under age when the action was commenced) *the day on which he accepted the bill*; and that the date of the bill will not be even presumptive evidence of the time of acceptance. [MAULE, J.—The note does not disclose the facts of the case. The ruling would be perfectly consistent with what is thrown out here, if the defendant became of age a day or two after the bill was drawn, and months before the commencement of the action.] So, in *Blyth v. Archbold*, and others, cor. Lord Abinger, C. B., Guildhall, July 9, 1835, in an action by the drawers against the acceptors of a bill, one of whom (Watson) pleaded infancy, the midwife and the defendant's tutor having proved his birth and identity,—Lord Abinger said the defendant was bound to make out his plea, and to show that he was an infant at the time he entered into the contract, viz. at the time of the acceptance. The bill was drawn at six months' date from the 18th of November. It did not appear when the acceptance was written, and

it might have been after the defendant was of age, as the bill had several months afterwards to run. One of the defendants' clerks was then called, who stated that the bill was left for acceptance between the 2d and 5th of October; that he wrote the words, "accepted, payable at Sir Richard Carr, Glynn & Co.'s," and placed it on Mr. Watson's desk; and that he never saw the bill afterwards. Lord Abinger said this carried the case a step further, *but the defendant ought to prove when he did accept*. [JERVIS, C. J.—Surely the latter fact was evidence of the time when the bill was accepted. The case presents some very remarkable features. It would seem, from the attempt made to prove the acceptance of the bill *before its date*, that the defendant came of age very close upon the drawing of the bill. MAULE, J.—Both these cases are too loose and apocryphal to be safely acted \*785] upon. In *Dickson v. Evans*, 6 T. R. 57, it was held, that, to an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant could not set off cash notes issued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unless he shows further that such notes came to his hands before the bankruptcy. "The whole of the present case," said Lord Kenyon, "is resolvable into this question, on whom did the onus probandi lie? That being settled, everything else follows of course. Now, the cases of set-off are understood to be in the nature of cross-actions; and, if the defendant, instead of setting off these notes, had brought his cross-action against the assignees, he must have proved everything necessary to constitute his demand; and the time when the notes were endorsed would be one material ingredient in that case: then, under this set-off, he must prove the same things. If the commissioners had refused to allow this set-off, and the defendant had applied to the Lord Chancellor by petition, he must have set forth in that petition that the notes were endorsed to him prior to the bankruptcy, and he must also have proved it." And Ashhurst, J., said: "It is a general rule of evidence, that, in every case, the onus probandi lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognisant." Here, the onus of proof clearly lay on the defendant; for, he alone (as between himself and the endorsee) could know when he accepted the bills. [TALFOURD, J.—The endorsee must know, when he takes a bill, whether it is accepted or not. MAULE, J.—Was there not here *some* evidence that the bills were accepted before maturity?] Not in the case of a man having means of proof of the particular fact. [MAULE, J.—He could have no means of proof before the late act allowing parties to give evidence, 14 & 15 Vict. c. 99: and \*786] that act can make no difference.] One of the bills,—\*that which became due on the 12th of March, 1851,—not being payable at the time the defendant became of age, no presumption can avail against the plaintiff there. Where the issue is on non acceptit, the

only presumption that could arise from the face of the bill, is, that the acceptance took place before the commencement of the action: but, where the issue is on a plea of infancy, the defendant undertakes to prove the precise time of the acceptance. [MAULE, J.—You are assuming that there is *no* evidence here. We think that the production of the bills, and proof of the defendant's handwriting, was evidence that the bills were accepted within a short, a reasonable, time after they were drawn.] The general rule laid down by Ashhurst, J., in *Dickson v. Evans*, and adopted by Starkie,—1 Stark. Evid. 3d edit. 420,—“that the onus probandi lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognisant,”—explains all the cases which were cited for the defendant.

JERVIS, C. J.—I am of opinion that this rule must be discharged. It has not been denied on the part of the defendant, nor can it be, that, on this plea, the defendant was bound to prove that he was an infant at the time of the acceptance of these bills. The only question is whether there was *any* evidence to establish that proposition; for, if there was, the learned judge was right in leaving it to the jury. There is no doubt the defendant was an infant at the time when four of the bills were at maturity: and there is also no doubt that all the bills were accepted by him during his infancy, if the production of the bills dated, with proof of the defendant's handwriting, was any evidence to go to the jury to show when they were accepted. My Brother Byles has in vain attempted to remove the impression made by the suggestion thrown out by my Brother Maule in the \*course of the argument, that the [\*787 ordinary mode of proving the acceptance of a bill before the commencement of the action, is, by merely putting in the bill, and proving the handwriting. There is nothing on the face of the bill to show when it was accepted. Why, then, is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action; because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out, and within a reasonable time after the drawing of them. But my Brother Byles, admitting that to be ordinarily so, says that it depends upon the form of the issue; and he insists that here the defendant was bound affirmatively to prove that the acceptance actually took place whilst he was an infant. But the true answer is this,—not that the circumstance of the particular form of the issue being different deprives the instrument of its ordinary effect when offered in evidence; but it is for the jury to say what effect is to be given to it in each case. I decide this case upon this broad ground,—that we are to presume, unless the contrary is shown, that a bill of exchange has been accepted, not on the day of its date, but within a reasonable time afterwards. It is not to be presumed that the acceptance took place after the maturity of the bill. That view disposes of

the case as to all these bills,—as to five of them, because they became due before the defendant attained the age of twenty-one; and, as to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority. For these reasons, I think the verdict was right, and that this rule should be discharged.

MAULE, J.—I am of the same opinion. The defendant by his plea \*788] undertook to prove that he was an infant \*at the time he accepted the bills declared upon: and the jury have found that he was an infant. The question is, whether there was any evidence to justify them in coming to that conclusion. The case has been treated in argument as one of presumption. I do not think it is a case of presumption at all. Presumption is, where a state of facts is taken to exist, without any proof at all of its existence. We cannot presume that the defendant was an infant when he accepted these bills: he must prove the fact. The way he does that, is, by showing that all the bills except one became due before he attained the age of twenty-one; and, as to that one, that the three days of grace expired on the 12th of March, 1851, and that he became of age on the 11th, that bill having been drawn at four months. The question is, whether these facts amount to evidence that the defendant was under age at the time he accepted the bills. It is conceded to be established that a bill of exchange is to be taken to have been issued at the time at which it bears date. That is undoubtedly the rule, with one exception only, viz., in the case of a bill which constitutes the debt on which the petition for a fiat in bankruptcy is founded: in that case, some independent evidence is required, that the bill was drawn at the time it purports to be drawn. That exception, however, only tends to prove the rule. The reason and foundation of the rule is, that ordinarily all instruments are written at the time they bear date. The production, therefore, of a bill, or of any other instrument, bearing a given date, is evidence, not conclusive, but reasonable evidence, that it was made at that time. Now, the acceptance of a bill in general is not dated; therefore, there is nothing in the mere fact of acceptance to show the precise day on which it takes place. In the cases of *Israel v. Argent* and *Blyth v. Archbold*, it may be that it was attempted to infer from the dates of \*789] the \*bills that they were accepted on those respective days. The reason for inferring that a bill is *drawn* on the day on which it bears date, does not apply to the *acceptance*; for, it is by no means the general usage to accept bills on the day on which they are drawn; therefore, proof of the fact of acceptance, coupled with the date of the drawing, do not amount to evidence that the bill was accepted on that particular day. But, although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day. Therefore, where the drawer and the acceptor are both living in the same town, the presumption is that the bill is accepted shortly,—within a few days,—after it is drawn; it being manifestly the interest of the drawer

to have a negotiable instrument made perfect as early as conveniently may be. The date of the bill, therefore, though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill would have to travel from the one party to the other. Upon the same principle on which that presumption rests, it may be presumed in this case that the bills were accepted before they arrived at maturity. I suggested, in the course of the argument, that the universal way of proving that the acceptance of a bill took place before the commencement of the action, was, by the mere production of the bill, and proof of the acceptor's handwriting. How can it prove that, except as showing that the acceptance took place before the bill became due? That being so, there was in this case evidence to warrant the jury in finding, as to all the bills except the last, that they were accepted before their maturity: and, as to the last bill, taking the limit of the reasonable time after the drawing of a bill, for its presentation for acceptance, to be, at all events, before the days of grace, I think there was also reasonable evidence that the acceptance of that bill took place [\*790 whilst the defendant was an infant.

Upon the whole, therefore, I think the evidence was properly admitted with respect to all the bills. This decision, though not in terms founded upon express authorities, rests upon principles not materially differing from those which are of constant occurrence, where the date of an instrument is *primâ facie* taken to be the date of its execution. I think, therefore, the verdict in this case was founded upon competent evidence, and that the rule to enter a verdict for the plaintiff must be discharged.

WILLIAMS, J.—For the reasons given by my lord and my Brother Maule, I concur with them in thinking that there was sufficient evidence in this case that all the bills were accepted by the defendant before he attained his majority.

TALFOURD, J., concurred.

Rule discharged.

## \*791] \*JAMES v. ISAACS and Others. Nov. 8.

In assumpsit for work and labour, the defendants pleaded,—that the money mentioned in the declaration accrued due to the plaintiff under an agreement for the building of a church; that, the plaintiff having suspended the work, another agreement was entered into between him and one A., under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work, and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A. duly made, and the plaintiff received, the payments stipulated for by the second agreement, in satisfaction and discharge of the original agreement between the plaintiff and the defendants, and of the performance thereof by the latter:—Held, that the plea was bad in substance, inasmuch as it did not show that the agreement made by A., and the payments under it, were intended to be made for the benefit of the defendants, and that they adopted A.'s acts.

Whether the 51st section of the 15 & 16 Vict. c. 76, is retrospective,—*quære?*

ASSUMPSIT for work and labour and materials, and for money found due upon an account stated.

Fourth plea,—by Cordes and Morgan, two of the defendants,—that the money in the first count mentioned, accrued due to the plaintiff under a certain agreement made on the 1st of September, 1847, between him and the defendants, whereby the plaintiff agreed with the defendants to execute and perform all the works necessary in the erection of a church in the parish of Malpas, in the county of Monmouth, agreeably to certain plans, specification, and detail of the same, numbered from one to fifteen inclusive, provided for that purpose by one John Prichard, Esq., architect; the whole of the said works to be performed for the sum of 1140*l.*, and to the entire satisfaction of the said John Prichard, the architect therein engaged: that, after the making of the said agreement, the plaintiff commenced the said works and the said building of the said church, according to the plans and specification, and continued and proceeded with the same until the 1st of August, 1850, when the said works and the said building of the said church were finished and completed: that, during the progress of the said works, and of the said building, and before the 18th of February, 1850, divers sums of money amounting in the whole to a large sum, to wit, 580*l.*, were paid to the plaintiff under the said agreement, and by the \*792] plaintiff received as instalments of the said sum of 1140*l.* for \*and in respect of the said works and building of the said church as aforesaid: that, after the plaintiff had so received the said sum of 580*l.*, and before the said 18th of February, 1850, to wit, on the 26th of January, 1850, the plaintiff discontinued the said works and the said building of the said church, and refused to continue the same, or to allow the same to be proceeded with, until he received payment of certain further sums of money, to wit, amounting to 320*l.*, as instalments of the said sum of 1140*l.*, for and in respect of the said building of the said church: that the plaintiff did then stop the said works, and the same remained so stopped until a certain day and year, to wit, the 18th of February, 1850: that thereupon, afterwards, to wit, on the

day and year last aforesaid, a certain agreement was made between the plaintiff and one Thomas Prothero, of Malpas Court, which said agreement was and is in the words and figures following, that is to say, "Whereas, I, Benjamin James, of Newport, builder, having agreed to erect the new church at Malpas, mentioned in the within specification and accompanying drawings, for the sum of 1140*l.*, have proceeded with the said work, and the building is now roofed and covered in, and I have received on account thereof the sum of 580*l.*; and whereas, in consideration of the sum of 200*l.* to be paid to me by Thomas Prothero, of Malpas Court, as follows, 50*l.* now down, the receipt of which I acknowledge, of 50*l.* more on the 4th of March next, 50*l.* more on the 18th of March next, and the remaining 50*l.* on the 4th of April next, do hereby agree with the said Thomas Prothero, to complete and finish in all respects the said new church according to the said plans and specification, so that the same shall be ready for consecration and opening on the first of May next; and further, that, for the sum that will remain unpaid to me for erecting and completing the said church, I will accept \*and depend on such subscriptions as have been promised, or can be raised, to and by the Rev. W. D. Isaacs; and [\*798 further, that the expense of the steeple in the bell turret, and of the two additional windows in the chancel over the communion-table, shall be paid out of the subscriptions of Mrs. Phipps and the Rev. Thomas Prothero. Dated the 18th of February, 1850. (Signed) Benjamin James:" that the said Benjamin James in the said agreement mentioned is the plaintiff in this suit, and that the said Rev. Thomas Prothero in the said agreement also mentioned was another and different person from the said Thomas Prothero party to the said agreement; and that the said Thomas Prothero party to the said agreement, did, on the said 4th of March, and on the 18th of March, and on the 4th of April, 1850 (all which days elapsed before the commencement of this suit), respectively, pay to the plaintiff the sum of 50*l.*, making up in the whole, with the said sum of 50*l.* in the said agreement mentioned, and thereby acknowledged to be paid, the sum of 200*l.* in the said agreement mentioned; and the plaintiff accepted and received the same of and from the said Thomas Prothero, in full and complete performance of the said agreement so entered into between the plaintiff and the said Thomas Prothero as aforesaid: that the plaintiff accepted and received the last-mentioned agreement, and the performance thereof by the said Thomas Prothero, in satisfaction and discharge of the said agreement between the plaintiff and the defendants, so made as aforesaid, and of the performance thereof by the defendants,—verification.

Special demurrer, assigning for causes,—that the fourth plea is ambiguous and uncertain, for not showing whether anything was due to the plaintiff at the time of making the agreement with Thomas Prothero or not, and that, if it be taken as admitting that something was due, it



\*794] shows no satisfaction of that debt; if, on the \*other hand, it be taken as denying that anything was then due, it is an informal and argumentative denial of the debt, and amounts to non assumpsit;—that it is inconsistent and repugnant, for alleging in the introductory part that the amount demanded became due under the agreement of the 1st of September, 1847, and then stating facts to show that it did not accrue due at all from the pleading defendants;—and that it does not confess any debt as alleged; or, if it confesses it, shows no discharge from, or satisfaction of, that debt. Joinder in demurrer.

*Lush*, in support of the demurrer.—It is difficult to understand what the plea means,—whether payment or non-liability. [MAULE, J.—It seems to amount to non assumpsit. JERVIS, C. J.—Or satisfaction by a stranger: see *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73).]

*Raymond*, contra.—The 51st section of the 15 & 16 Vict. c. 76,—which enacts that “no pleading shall be deemed insufficient, for any defect which could heretofore only be objected to by special demurrer,”—precludes the plaintiff from objecting that the plea amounts to non assumpsit. [*Lush*.—This demurrer was delivered before the passing of that act.] The act is retrospective in this respect; for, though there are many sections which exclude from the operation of the act proceedings that are pending, there is no such provision in this section. [JERVIS, C. J.—The 50th section, which is clearly prospective, originally stood alone,—providing that “either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and \*795] \*matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of, form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of, form.” The 51st section was added in the Commons.]

*Lush*.—The court must see a clear and unambiguous intention to make the 51st section retrospective, before they adopt a construction which would operate so unjustly. The whole scope of the act shows that pending demurrers were not contemplated. If the argument on the other side be correct, it would equally apply where judgment had been given, and error brought. [MAULE, J.—I think the subject-matter of legislation here must be taken to be, pleas pleaded prospectively.] The 49th and 50th sections clearly show that that is so. The language of s. 51 evidently contemplates only future, and not existing proceedings: that is the natural and grammatical sense of the words. In *Doe d. Smith v. Roe*, 8 Exch. 127,† the Court of Exchequer held, that, where the declaration in ejectment was served before the coming into operation of this act, the old proceeding by motion for judgment against the

casual ejector was correct,—ss. 168 and 177, applying to future proceedings only. In *Moon v. Durden*, 2 Exch. 22,† the Court of Exchequer lay it down that the general rule in construing recent statutes is, “*Nova constitutio futuris formam imponere debet*,”—though that rule, which is one of construction only, will yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation. [MAULE, J.—There are many clauses in this act, like the bankrupt act, 12 & 13 Vict. c. 106, which are expressed to be retrospective; these exceptions tend to show that the general subject of legislation is intended to be, future proceedings only.] It is \*not the usual course of legislation to deprive parties of vested [\*796 rights.

*Raymond*.—A man cannot well claim a “vested right” in a technical objection. The 51st section can have no sensible construction at all, unless it applies to pending demurrers. The 52d section provides ample means by which the plaintiff might have had the pleading amended upon such terms as a judge might think fair. It enacts, that, “if any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court, or any judge, shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit.” The 146th section enacts that “no judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced or brought, and prosecuted with effect, within six years after such judgments signed or entered of record.” That applies in terms to pending judgments; yet, if s. 51 be not retrospective, neither can that section be. [MAULE, J., referred to s. 148, which enacts that “a writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this act shall invalidate any proceedings already taken or to be taken by reason of any writ of error issued before the commencement of this act.”](a)

JERVIS, C. J.—We will hear the argument: and, if \*we should [\*797 hold the plea to be bad in substance, this point will not arise: if necessary, we will consult the other judges upon the construction of the 51st section.

*Raymond*.—The plea is good in substance, as well as in form. The question is, whether, the intention of the parties being clear, that the second agreement should be substituted for the first, there is any principle of law which prevents the court from giving effect to such

(a) See *Morgan v. Jones*, 8 Exch. 128,† where it was held that the 15 & 16 Vict. c. 76, ss. 100, 101, which abolish the old mode of proceeding for judgment as in case of a nonsuit, apply to cases where issue has been joined, and default made in going to trial in pursuance of notice, before that act came into operation.

intention. [MAULE, J.—The substantial objection is, that the contract set up by the plea is made between the plaintiff and a third person, the defendants being no parties to it.] Suppose it amounts to accord and satisfaction by a third party, would there be any objection on that ground? According to *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73), it would seem not. In *Jones v. Broadhurst*, 9 C. B. 173, 198 (E. C. L. R. vol. 67), the court, in giving judgment, refer to a passage in Fitzherbert's Abridgment, title *Barre*, pl. 166, where it is said that, "if a stranger does trespass to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied:" and, at the end of the judgment,—p. 198,—they say: "It must be obvious that the decision in the 36 H. 6, reported in Fitzherbert, is consistent with reason and justice." That view was acted upon in *Belshaw v. Bush*. [JERVIS, C. J.—Here, the party with whom the second agreement was made, is a stranger to the defendant.] It is difficult to see upon what principle such an agreement, of which the plaintiff has had all the benefit, should be held inoperative. In *Thurman v. Wild*, 11 Ad. & E. 453 (E. C. L. R. vol. 39), 3 P. & D. 289, it was held, that, in an action for a trespass committed by the defendant as servant and by command of P. B., acceptance of satisfaction by the plaintiff from P. B. was a defence. It is submitted, \*therefore, \*798] that this plea does show a substantial defence to the action.

[MAULE, J.—You should have shown that the second agreement was made on behalf of the defendants.] That is contrary to *Belshaw v. Bush*. [MAULE, J.—No. At the conclusion of the judgment there, the court say: "It appears to us, therefore, that the bill given by William Bush on account of the causes of action of the plaintiff against the defendant, must be taken to be a conditional payment *on behalf of the defendant*; that the condition to defeat it not having happened, it operates as an absolute payment; that it might be adopted, and has been adopted, by the defendant, who relies on it in his plea; and, consequently, that it bars the action." That we inferred from the language of the plea.] The frame of this plea brings it precisely within the same predicament. The money paid pursuant to the second agreement, could only have been paid in satisfaction of the money due under the first agreement.

Then, as to the form of the plea. The first objection taken, is, that it amounts to non assumpsit. [MAULE, J.—The substance of the plea, is, that, pending the agreement, and before any right of action accrued to the plaintiff under it, it was agreed between the plaintiff and a third person, that a new and different agreement should be substituted for it. So that the defendant seeks to show that the agreement declared upon is put an end to by another agreement to which the defendant himself is no party.] It is enough for the defendant to show that the plea

gives colour: it admits the agreement, and the work done under it: *Leyfield's case*, 10 Co. Rep. 88; *Stephen on Pleading*, 5th edit. p. 234. There are many cases where the setting up such a collateral agreement as this does not make the plea objectionable on this ground. Thus, in *Smart v. Hyde*, 8 M. & W. 723,† 1 Dowl. N. S. 60, a declaration in assumpsit stated, that in consideration that the plaintiff \*would [\*799 buy of the defendant a mare at a certain price, the defendant promised that she was sound, and averred as a breach that she was not sound. The defendant pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were, that "a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the mean time a notice and certificate of unsoundness were given;" that the sale took place subject to the rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited: and it was held, that the plea was good, and did not amount to the general issue. "It admits," said Parke, B., "the contract and the promise, but shows it to have been subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration: but upon that point I give no opinion. It is enough to say that every word of this plea is consistent with the contract stated in the declaration." *Sieveking v. Dutton*, 3 C. B. 331 (E. C. L. R. vol. 54), 4 D. & L. 197, is to the same effect. [MAULE, J.—I think this plea clearly amounts to the general issue. It is very like the plea in *Solly v. Neish*, 2 C. M. & R. 355,† 5 Tyrwh. 625, 4 Dowl. P. C. 248.]

\**Lush*, in reply, was desired by the court to confine himself [\*800 to the objection in substance to the plea.—*Belshaw v. Bush* is very distinguishable from this case: there, the payment by the stranger was made on behalf of, and was adopted by, the defendant: here, there was an executory contract between the plaintiff and the defendants for the erection of a church; before that agreement was executed, another agreement between the plaintiff and a stranger was substituted,—a new contract with a stranger; not an act done in satisfaction of an existing claim. There must be two parties to the rescission of an agreement. [MAULE, J.—If the plaintiff and the defendant had agreed as the plaintiff and Thomas Prothero did by the agreement of the 18th of February,

1850, no doubt the first agreement would have been rescinded. But it is not alleged here that Prothero made that agreement on behalf of the defendant, so as to entitle him to ratify and adopt it. It is hardly possible to say that the plaintiff could have sued the defendants on that agreement.] The defendants seek to alter their contract, by another contract to which they are no parties. [MAULE, J.—There are in fact two agreements capable of subsisting together.] Exactly so.

JERVIS, C. J.—In the view we take of this plea, it will not be necessary to consider further the construction of the 51st section of the 15 & 16 Vict. c. 76. We think the plea is bad in substance, on the ground just stated.

The rest of the court concurring,

Judgment for the plaintiff.

S. C. 14 E. C. 4 E. 247

\*801]

\*LEROUX v. BROWN. Nov. 10.

An action will not lie in the courts of this country, to enforce an oral agreement made in France (and valid there), which, if made here, could not, by reason of the statute of frauds, have been sued upon.

ASSUMPSIT. The declaration stated, that, on the 1st of December, 1849, at Calais, in France, to wit, at Westminster, in the county of Middlesex, in consideration that the plaintiff, at the request of the defendant, then agreed with the defendant to enter into the service of the defendant as clerk and agent, and to serve the defendant in that capacity for one year certain, at certain wages, to wit, 100*l.* a year, to be paid by the defendant to the plaintiff by equal quarterly payments during his continuance in such service, the defendant then promised the plaintiff to receive him into his said service, and to retain and employ him in his said service, at the wages aforesaid: Averment that the plaintiff, confiding in the promise of the defendant, was then, and from thence continually had been, ready and willing to enter into the service of the defendant as aforesaid, and to serve the defendant, for the wages aforesaid: Breach, that, though the plaintiff afterwards, to wit, on the day and year aforesaid, requested the defendant to receive the plaintiff into the service of the defendant as aforesaid, and to retain and employ him in such service, at the wages aforesaid; yet the defendant, not regarding his promise, did not, nor would, at the time he was so requested as aforesaid, or at any other time, receive the plaintiff into his service as aforesaid, or retain or employ him, at such wages as aforesaid, or in any other way, but wholly neglected and refused so to do; whereby the plaintiff not only lost and was deprived of all the profits and emoluments which might and would otherwise have arisen and accrued to him

\*802] from entering into the service of the defendant, but also lost and was deprived of the means and opportunity of being retained

27 C. 27261.

and employed by and in the service of divers other persons, and remained wholly out of service and unemployed for a long time, to wit, for the year then next following, and was and is otherwise greatly injured, &c.

Pleas,—first, non assumpsit,—secondly, that the plaintiff was not ready and willing to enter into the service of the defendant, and to serve him the defendant, for the wages in the declaration mentioned, in manner and form as in the declaration was alleged,—thirdly, that the plaintiff did not request the defendant to receive him, the plaintiff, into the service of him, the defendant, or to retain or employ him, the plaintiff, in such service, at the wages in the declaration mentioned, in manner and form as the plaintiff had above in the declaration alleged.

Upon each of these pleas issue was joined.

The cause was tried before Talfourd, J., at the second sitting in Middlesex, in Trinity Term last. It appeared that an oral agreement had been entered into at Calais, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighbourhood, for transmission to the defendant here,—the employment to commence at a future day, and to continue for one year certain.

Evidence was given on the part of the plaintiff to show, that, by the law of France, such an agreement is capable of being enforced, although not in writing.

For the defendant, it was insisted, that, notwithstanding the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law; and, being a contract not to be performed within a year, the statute of frauds, 29 Car. 2, c. 3, s. 4, required it to be in writing.

\*Under the direction of the learned judge, a verdict was entered for the plaintiff on the first issue,—leave being reserved to [808 the defendant to move to enter a nonsuit or a verdict for him on that issue, if the court should be of opinion that the contract could not be enforced here.

*Hawkins*, in the last term, obtained a rule nisi accordingly.

*Allen*, Serjt., and *Metcalf*, now showed cause.—The question is, whether the 4th section of the statute of frauds applies to a foreign contract which is sought to be enforced in this country. The evidence showed that this was a contract by parol, not to be performed within a year, made in France, and to be performed in France. [MAULE, J.—If the statute relates to procedure, this action is not maintainable; if only to the rights and merit of the contract, it is.] The rule is well laid down by Tindal, C. J., in *Huber v. Steiner*, 2 N. C. 202, 2 Scott, 304. “The distinction,” says that learned judge, 2 Scott, 326, “between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by

our English courts of law, is well known and established, viz., that so much of the law as affects the *rights* and *merit* of the contract, all that relates 'ad litis decisionem,' is adopted from the foreign country; so much of the law as affects the *remedy* only, all that relates 'ad litis ordinationem,' is taken from the *lex fori* of that country where the action is brought. And that, in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractus*, is evident from many authorities. In

\*804] Huber's treatise *De Conflictu Legum*, § 7, he says: 'Ratio hæc \*est, quod *præscriptio* (where, observe, the term *præscriptio* is used generally for limitation) et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ.' It is unnecessary to cite more: the authorities are collected in the case of *The British Linen Company v. Drummond*, 10 B. & C. 903 (E. C. L. R. vol. 21), which case itself furnishes an authority for the position." That imports, that, if the contract be a complete and valid contract according to the foreign law, it may be enforced here. [MAULE, J.—The 4th section of the 29 Car. 2, c. 3, says, that, "no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," wherever made.] If the words "wherever made" are to be imported into the statute, the plaintiff is out of court. [MAULE, J.—There is no limitation. JERVIS, C. J.—Suppose the contract had been made here,—could it have been enforced in France?] Being a void contract here, it could not be sued upon there. [MAULE, J.—Has such a contract been enforced in equity?] It is conceived not.(a) The words "no action shall be brought" relate not to mere matter of procedure only, but go to the very root and inception of the thing. In *Carrington v. Roots*, 2 M. & W. 248,†—which was an action in which the plaintiff set up a verbal contract for the purchase of growing crops,—Lord Abinger said: "If this be a contract for the sale of goods, it is not disputed that it is void by the 17th section of the statute. But, if that be doubtful, and it is to be considered as the sale of an interest in land, and therefore within the 4th section, then the question is, whether that section, which declares that no action shall be brought whereby to charge

\*805] \*any person on a contract for the sale of an interest in land, means that the contract shall be available for any purpose as a contract, excepting that of being enforced by action. I think it does not; and that the contract cannot be available as a contract at all, unless an action can be brought upon it. I think that the meaning of the statute is, not that the contract shall stand for all purposes except

(a) See *Randall v. Morgan*, 12 Ves. 67.

that of being enforced by action, but it means that the contract shall be altogether void." And Parke, B., said: "I think the right interpretation of that section (s. 4) is this,—that an agreement which cannot be enforced on either side, is as a contract void altogether." That doctrine was acted upon in the recent case of *Reade v. Lamb*, 6 Exch. 130.† It was there said in argument,—“The 17th section says that no contract for the sale of goods for the price of 10*l.* or upwards ‘shall be allowed to be good.’ The 4th section enacts that ‘no action shall be brought, &c., whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another:’ so that the one section, in effect, makes the contract altogether void, whereas the other merely precludes the party from suing upon it. Where, therefore, the requisites of the 4th section are not complied with, there is a subsisting contract, although it is not available for the purposes of an action.” But Pollock, C. B., said: “*Carrington v. Roots* is in effect a decision, that, for the purposes of the present question, there is no distinction between the 4th and 17th sections of the statute of frauds; and that, not only no action can be brought upon an agreement within the 4th section of that statute, if it be not reduced into writing, but that the contract is also void.” [MAULE, J.—The 4th section of the statute of frauds entirely applies to procedure. It may be that the words used, operating on contracts made in England, render them void.] It will be a new and a startling doctrine, to hold that a contract made abroad cannot be enforced here, unless it observes \*all the formalities prescribed by the law of this country. The two cases in the Exchequer decide distinctly that the 4th and the 17th sections have precisely the same meaning, though their language is different. [MAULE, J.—You contend that the contract is good in France and void in England. Our legislature has no jurisdiction to declare void a contract made in France, but it may say that no action shall be brought in this country upon any contract which is not in writing. If the 4th section prohibits *procedure*, it will be unnecessary to consider the distinction taken in the two cases of *Carrington v. Roots* and *Reade v. Lamb*.] If the effect of the statute be not to make the contract void, should not the defendant have pleaded the statute? [MAULE, J.—How?] As was done in *Reade v. Lamb*. In Story’s *Conflict of Laws*, § 260, speaking of foreign contracts, it is said, —“Another rule, naturally flowing from, or rather illustrative of, that already stated respecting the validity of contracts, is, that all the formalities, proofs, or authentications of them, which are required by the *lex loci*, are indispensable to their validity everywhere else.(a) And this is in precise conformity to the rule laid down on the subject by

(a) 1 Burge Comm. Part 1, Ch. 1, pp. 29, 30; 3 Burge Comm. Part 2, Ch. 20, pp. 752—764; Félix Conflit des Lois, Revue Etrang. et Franc. Tom. 7, 1840, §§ 40—51, pp. 346—360; *Warrender v. Warrender*, 9 Bligh, 111.



Boullenois.(a) Il faut, par rapport à la forme intrinsèque et constitutive des actes, suivre encore la loi du contrat. Quand la loi exige certaines formalités, lesquelles sont attachées aux choses memes, il \*807] \*faut suivre la loi de la situation.(b) Burgundus has expressed the same doctrine in very pointed terms. Et quidem in scriptura instrumenti, in solemnitatibus, et ceremoniis, et generaliter in omnibus quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis ubi fit negotiatio.(c) Dumoulin says: Aut statutum loquitur de his quæ concernunt nudam ordinationem vel solemnitatem actus; et semper inspicitur statutum vel consuetudinem loci ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis, aut aliis conficiendis.(d) And, again: In concernentibus contractum, et emergentibus, spectatur locus in quo contrahitur: et in concernentibus meram solemnitatem cujuscumque actus, locus in quo ille celebratur.(e) Casaregis says: Communissima enim est distinctio, quod aut disseritur de modo procedendi in judicio, aut de juribus contractus, cui rober et specialis forma tributa est a statuto, vel a contractantibus. Et in primo casu attendendum sit statutum loci in quo judicium agitur; in secundo, vero, casu attendatur statutum loci in quo fit celebratus contractus.(g) Hertius is still more direct: Si lex actui formam dat, inspiciendus est locus actûs, non domicilii, non rei sitæ; id est, si de solemnibus quæeratur, si de loco, de tempore, de modo actûs, ejus loci habenda est ratio, ubi actus sive negotium celebratur.(h) \*808] \*Christinæus, Everhardus, and other distinguished jurists, adopt the same doctrine.(i) And it seems fully established in the common law. Thus, if by the laws of a country, a contract is void unless it is written on stamp paper, it ought to be held void everywhere; for, unless it be good there, it can have no obligation in any

(a) Erskine's Instit. B. 3, tit. 2, §§ 39, 40, 41, pp. 514, 515; Boullenois, Quest. Mixt. p. 5; Bouhier Cont. de Bourg. Ch. 21, § 205; 2 Boullenois, Observ. 46, p. 467; 1 Hertii Op. de Collis. Leg. § 4, n. 59, edit. 1737; Id. p. 209, edit. 1716. See also Voet, ad. Pand. Lib. 5, tit. 1, § 51; 1 Boullenois, Observ. 23, p. 523; Id. pp. 446—466; Henry on Foreign Law, 37, 38; Id. 224; 5 Pardessus, Droit Comm. art. 1485; Mr. Justice Martin in Depau v. Humphreys, 20 Martin, R. 1, 22.

(b) 2 Boullenois, Observ. 46, p. 467; 1 Boullenois, Observ. 23, pp. 491, 492.

(c) Burgundus, Tract 4, n. 7, n. 29; 2 Boullenois, Observ. 46, pp. 450, 451.

(d) Molin. Opera, Comment. Cod. Lib. 1, tit. 4, l. 1, Concl. de Statut. Tom. 3, p. 354, edit. 1681.

(e) Molin. Opera, tit. 1, De fiefs, § 12, Gloss. 7, n. 37, Tom. 1, p. 224, edit. 1681.

(f) Casaregis, Disc. Comm. 179, n. 59.

(g) Hertii Opera, Collis. Leg. § 4, n. 10, p. 126; Id. n. 59, p. 148, edit. 1737; Id. pp. 179, 209, edit. 1716. See also Cochin, Œuvres, Tom. 1. p. 72, 4to. edit.; Id. Tom. 3, p. 26; Id. Tom. 5, p. 697; D'Aguesseau Œuvres, Tom. 4, pp. 637, 722, 4to. edit.

(i) Everhard. Consil. 72, n. 11, p. 206; Id. n. 18, p. 207; Id. 27, p. 209; Christin. Decis. 283, Vol. 1, p. 355, n. 1, 4, 5, 8, 9, 10, 11; Molin. Comment. ad. Consuet. Paris, tit. 1, § 12, Gloss. 7, n. 37, Tom. 1, p. 224; 2 Boullenois, Observ. 46, pp. 460, 461. Dumoulin pushes the doctrine further, and says, Et est omnium Doctorum sententia ubicumque consuetudo, vel statutum locale, disponit de solemnitate, vel formâ actus, ligari etiam exteros ibi actum illum gerentes, et gestum esse validum et efficacem ubique, etiam super bonis solis extra territorium consuetudinis. Molin. Consil. 53, § 9; Molin. Opera, Tom. 2, p. 965, edit. 1681; 2 Burge Comm. Part 2, ch. 9, pp. 865, 866.

other country.(a) \*It might be different, if the contract had been made payable in another country; or if the objection were, not to the validity of the contract, but merely to the \*admissibility of other proof of the contract in the foreign court,(b) where a suit was brought to enforce it; or if the contract concerned real or immovable property situated in another country whose laws are different, respecting which there is a difference of opinion among foreign jurists, although in England and America the rule seems firmly established, that the law rei sitæ, and not that of the place of the contract,

(a) *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Campb. 166. But see Chitty on Bills, 8th edit. p. 143, n., and *Wynne v. Jackson*, 2 Russ. 351; 3 Burge Comm. Part 2, ch. 20, p. 762. The case of *Wynne v. Jackson* is certainly at variance with this doctrine. It was a bill brought to stay proceedings at law on a suit brought in England by the holder against the acceptor of a bill of exchange made and accepted in France, and which, in an action brought in the French courts, had been held invalid for want of a proper French stamp. The Vice-Chancellor held "that the circumstance of the bills being drawn in France in such a form that the holder could not recover on them in France, was no objection to his recovering on them in an English court." This doctrine is wholly irreconcilable with that in *Alves v. Hodgson* and *Clegg v. Levy*: and if, by the laws of France, such contracts were void, if not on stamped paper, it is equally unsupportable upon acknowledged principles. In the case of *James v. Catherwood*, 3 D. & R. 190 (E. C. L. R. vol. 16), where assumption was brought for money lent in France, and unstamped paper receipts were produced in proof of the loan, evidence was offered to show, that, by the laws of France, such receipts required a stamp to render them valid; but it was rejected by the court, and the receipts were admitted in evidence, upon the ground that the courts of England could not take notice of the revenue laws of a foreign country. But this is a very insufficient ground, if the loan required such receipt and stamp to make it valid as a contract. And, if the loan was good per se, but the stamp was requisite to make the receipt good as evidence, then another question might arise, whether other proof than that required by the law of France was admissible, of a written contract. This case also is inconsistent with the case in 3 Campb. 166 (*Clegg v. Levy*). Can a contract be good in any country, which is void by the law of the place where it is made, because it wants the solemnities required by that law? Would a parol contract made in England, respecting an interest in lands, against the statute of frauds, be held valid elsewhere? Would any court dispense with the written evidence required upon such a contract? On a motion for a new trial, the court refused it, *Abbott, C. J.*, saying,—“The point is too plain for argument. It has been settled, or, at least, considered as settled, ever since the time of Lord Hardwicke, that, in a British court, we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid.” With great submission to his lordship, this reasoning is wholly inadmissible. The law is as clearly settled as anything can be, that a contract void by the law of the place where it is made, is void everywhere. Yet, in every such case, whatever may be the inconvenience, courts of law are bound to ascertain what the foreign law is. And it would be a perfect novelty in jurisprudence, to hold that an instrument which, for want of due solemnities in the place where it was executed, was void, should yet be valid in other countries. We can arrive at such a conclusion only by overturning well-established principles. The case alluded to, before Lord Hardwicke, was probably *Boucher v. Lawson*, Cas. temp. Hardw. 85; *Id.* 194; which was the case of a contract between Englishmen, to be executed in England, to carry on a smuggling trade, against the laws of Portugal. Lord Hardwicke said that such a trade was not only a lawful trade in England, but very much encouraged. The case is wholly distinguishable from the present case, and from that of any contract made in a country, and to be executed there, which is invalid by its laws. A contract made in Portugal, by persons domiciled there, to carry on smuggling, against its laws, would, or ought to be, held void everywhere. See also 3 Chitty on Com. and Manufac. ch. 2, p. 166.

(b) *Ludlow v. Rennsalaer*, 1 John. R. 93; *James v. Catherwood*, 3 D. & R. 190 (E. C. L. R. vol. 16). See *Clarke v. Cochran*, 3 Martin R. 358, 360, 361; *Brown v. Thornton*, 6 Ad. & E. 185 (E. C. L. R. vol. 33); *Yates v. Thompson*, 3 Clark & Fin. 544.

is to prevail.”(a) Again, in § 262, Story says: “By the English and American law, contracts which fall within the purview of what is called the statute of frauds, are required to be in writing; such are contracts respecting the sale of lands, contracts for the debts of third persons, and contracts for the sale of goods beyond a certain value. If such contracts made by parol (*per verba*) in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place where they are made. And the like rule applies, *vice versâ*, where parol contracts are good by the law of the place where they are made; but they would be void, if originally made in another place, where they are sought to be enforced, for want of certain solemnities, or for want of being in writing, as required by the local law.” [JERVIS, C. J.—Dr. Story puts the 4th and 17th sections together as both avoiding the contract.] In Burge’s Commentaries on Colonial and Foreign Law, Vol. I. p. 29, it is said: “The place in which the contract is to be performed, is comprehended \*811] in the term *locus contractus*, and the law of that, and not of the place in which the contract is entered into, often determines its validity and obligatory effect. The *lex loci contractus* decides on its obligatory effect. Thus, a contract entered into in a country the laws of which admit it to be binding, if proved by witnesses, without writing, and without any distinction as to the amount of the sum in question, would receive effect in the country where it was the subject of contestation, although, if entered into in that country, it would not have been valid, unless it had been evidenced by writing.” Again, Vol. III., p. 759, it is said: “Jurists treat as the solemnities of the contract whatever formality or ceremony, either as to the time, or place, or manner of making the contract; or as to its form, as, whether by parol or in writing, its attestation or authentication, and which the law renders essential to the perfection and validity of the contract, and requires to be observed as the condition on which it recognises the existence of the contract. They concur in holding that the validity or invalidity of the contract, so far as it depends on the forms and solemnities, is governed by the law of the place in which the contract is made. Dumoulin first states what he considers included in the form of the contract: *Quando cumque lex vel statutum præscribit aliquem modum ad faciendum actum, ille modus dicitur formam*. He then adds ‘*Unaquæque civitas, habens jurisdictionem, potest per statutum facere aliquam formam contractus, quæ si non srevetur, contractus non valeret.*’(b) Burgundus says: ‘*In scripturâ instrumenti, solemnitatibus et ceremoniis, et generaliter in omnibus quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo*

(a) Fœlix, *Conflit des Loix*, Revue Etrang. et Franc. Tom. 7, 1840, §§ 40—50, pp. 346—359.

(b) Dumoulin, ad Cod. lib. 4, tit. 44; 1 Boullenois, Tr. des Stat. tit. 2, c. 3, Observ. 23, Cod. lib. 8, tit. 49, l. 1; Bartolus, ad Cod. 1, Cunctos Populos, n. 13.

regionis \*ubi fit negotiatio.'(a) 'Conditio loci et temporis perfectionem formæ quoque respiciunt, et ideo à regione contractus pariter diriguntur.'(b) Hertius has stated the rule: 'Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitæ: id est, si de solemnibus quærat, si de loco, de tempore, de modo actus, ejus loci habenda est ratio, ubi actus sive negotium celebratur. Regula hæc apud omnes, quantum quidem sciam est indubitata.' These Jurists are followed by P. and J. Voet.(c) Thus, if the law of the country where the contract is made annuls a contract if it be made on a Sunday, or in a particular place, as, a prison or tavern, a contract made in the country in contravention of such law, would be void, in whatever country it was sought to be enforced.(d) The 54th article of the Ordinance du Moulins did not recognise a contract, if the subject of it exceeded in value one hundred livres, unless it was reduced to writing.(e) A contract where the amount exceeded that sum, made in France, could not be recognised unless it were in writing.(g) But, if it were made in England, although not reduced into writing, it would be admitted in France to be proved by witnesses, notwithstanding the subject-matter of the contract exceeded one hundred livres.(h) On the other hand, if the contract had been made in France between \*two Englishmen, it would not have been admitted in evidence in the courts of France, nor would they have given [\*813 effect to it."(h) In Boullenois, *Traité des Statuts réels et personnels*, Tom. 2, tit. iv., ch. 2, observ. 46, p. 459, it is said: "Il faut communément suivre la loi du lieu du contrat dans tout ce qui peut former le lien du contrat, ce que l'on appelle *vinculum obligationis*; cependant cela dépend beaucoup des circonstances. Ainsi, deux particuliers contractent ensemble en présence de témoins, et sans écrit, dans un endroit ou pareilles conventions forment de véritables engagements, et à raison de quoi la preuve par témoins est admise dans cet endroit pour quelque somme que ce soit, même au-dessus de 100 livres; ils plaident ensuite dans un lieu où cette preuve par témoins n'est pas admise; dans cette espèce, je ne trouve pas de difficulté à dire qu'il faudra admettre la preuve par témoins, parceque telle preuve appartient ad *vinculum obligationis* et *solemnitatem*; et c'est sans doute dans cette espèce que se trouverent les deux Anglois dont parle Brodeau, lettre C, n. 42, entre lesquels fut ordonné la preuve par témoins, pour un prêt qui excédoit 100 livres, et dont il n'y avoit pas d'écrit. Voyez la traité de la

(a) Burgundus, Tr. 4, n. 9; Tr. 5; Boullenois, Tr. des Stat. tit. 4, c. 2, observ. 46, p. 450.

(b) Boullenois, Tr. des Stat. tit. 4, c. 2, obs. 46, p. 451.

(c) Hert. d. Coll. Leg. sec. 4, § 10, p. 126; Carps. p. 3, c. 6, d. 12, n. 4, 5, et lib. 5, Resp. 1; F. Hottomann, cons. 52; P. Voet, § 9, de Statut. n. 9; Mœvius, Part 1, dec. 163, n. 6; Matth. de Affict. d. 695; J. Voet, ad Pand., lib. 1, tit. 5, n. 13.

(d) Boullenois, Tr. 1, tit. 2, c. 3, obs. 23, p. 491; M. Pollet, Arrêts du Parlement de Flandres, Part 2, c. 31; Arrêt du 21 Oct. 1730, du Parlement de Dijon; Commentaire de M. le P. Bouhier, c. 33, n. 15.

(e) Danty, Tr. de la Preuve, p. 49, n. 11.

(g) Danty, ib.

(h) Danty, ib. p. 49, edit. 1737.

Preuve par témoins de Danty, p. 41, de l'édition de 1708. Quelquesuns prétendent que cela a été ainsi jugé, non pas parceque ces deux Anglois avoient contracté selon la loi du lieu du contrat, mais parcequ'étant Anglois, ils avoient contracté entr'eux comme on contracte dans leur nation ; mais cette réflexion seroit bonne, si, ayant contracté ailleurs, selon les lois de leur pays, ils venoient plaider chez eux, tunc ex æquo et bono in patria sustineretur contractus, et c'est la decision de Hertius, de Collis Leg. posit. n. 10 ; ou, après avoir établi que *lex actui formam dat et que inspiciendus et locus actûs, non domicilii, non rei sitæ*, observe que cette regle ne vaut pas, si *actus inter duos celebretur, verbi* \*814] *\*gratiâ Pactum, et uterque paciscens sit exterus, et unius civitatis cives ; dubitandum enim non est actum à talibus, secundùm leges patriæ, factum in patriâ valere.* Voet, sect. 9, cap. 2, n. 9, dit la même chose ; c'est encore la décision de Godefroi, sur la Loi 20, de Jurisdict. dans le cas d'un testament. *Quid superioribus locis factum testamentum, non illorum locorum solemnitate, sed patriæ, nunc in patria valebit ? Id videtur : jus enim patriæ in testamentorum solemnitatibus spectari oportet ; mais je ne vois pas d'auteurs qui soient de l'avis qu'un tel contrat fait ailleurs, secundùm patriæ leges, doit avoir lieu etiam extra patriam.*" [MAULE, J.—A will to operate on lands in England, must be executed in compliance with the law of England. But, if it is to operate on personalty only, it is good if executed according to the law of the country where it is made.] The authorities above cited, it is submitted, conclusively show that this contract, being good according to the law of the place where it was entered into, is capable of being enforced in an English court of law.

*Honyman* (with whom was *Hawkins*), in support of the rule.—As to the general principle which must govern this case, there is no doubt : the contract receives its interpretation from the law of the country in which it is made ; the remedy is to be taken according to the law of the country where it is sought to enforce it. In *The British Linen Company v. Drummond*, 10 B. & C. 903 (E. C. L. R. vol. 21), and *Huber v. Steiner*, 2 N. C. 202, 2 Scott, 304, the statute of limitations was held to be part of the remedy : so, in *De la Vega v. Vianna*, 1 B. & Ad. 284 (E. C. L. R. vol. 20), the power of arrest was held to be part of the remedy,—although the law of Portugal, where the contract was made, and where both the parties resided at the time, did not allow of arrest. In *The General Steam-Navigation Company v. Guillou*, 11 M. & W. 877,† though the court were \*815] \*equally divided in opinion as to the proper construction of the plea, yet they all agree that "it is well established, that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted,—the *lex fori*." The principle is again recognised in the House of Lords in *Don v. Lippmann*, 5 Clark & Fin. 1, and in *Fergusson v. Fyffe*, 8 Clark & Fin. 121. In *Don v. Lippmann* the question arose upon the statute

of limitations; and the judgment of Lord Brougham is well worthy of attention. After stating the facts, his lordship says,—“On these short and admitted facts, and on this further assumption, that the bill, being accepted in France, is payable there, the question arises,—and it is one which is not only the principal point, but it disposes of all the rest,—viz. which of the two laws, the law of France, where the bill is accepted and is payable, or that of Scotland, where the debtor resides, shall rule the decision of the case: that is, in other words, whether the prescription set up is to be that of Scotland or France. The law on this point is well settled in this country, where this distinction is properly taken, that, whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in *The British Linen Company v. Drummond*, *De la Vega v. Vianna*, and in *Huber v. Steiner*, though the reverse had previously been recognised in *Williams v. Jones*, 13 East, 489. Then, assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the contract itself, or to the remedy. When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time the rule, \*for the parties would not suppose that the contract might afterwards come before the tribunals of a foreign country. But [\*816 it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy, when they make the contract. They bind themselves to do what the law they live under requires; but, as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. This is the lowest ground on which to place the case. The inconvenience of pursuing a different course, is manifest. Not only the principles of the law, but the known course of the courts, renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true that there may be no difficulty in knowing the law of the place of the contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the courts where the remedy is to be enforced. No one can say, that, because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced, or the other preliminary proceedings of those courts must be adopted, or that the rules of

pleading, or the curial practice of the foreign country, must necessarily be followed. No one will assert, that, before the jury court in Scotland, the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or, take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the jury only. No one will contend in terms that the foreign rules of evidence should guide us in such cases: and yet it is not so easy to avoid that principle \*817] in practice, if you admit, that, though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country. Look to the rules of evidence, for example. In Scotland, some instruments are probative; in England, until after the lapse of thirty years, they do not prove themselves. In some countries, forty years are required for such a purpose; in others, thirty are sufficient. How, then, is the law to be ascertained which is to govern the particular case? In one court, there must be a previous issue of fact: in another, there need be no such issue. In the latter, then, the case must be given up as a question of evidence. Then, come to the law. The question whether a parol agreement is to be given up or can be enforced, must be tried by the law of the country in which the law is set in motion to enforce the agreement. Again, whether payment is to be presumed or not, must depend on the law of that country, and so must all questions of the admissibility of evidence; and that clearly brings us home to the question on the statute of limitations." The argument on the other side is, that, because this is a good contract according to the law of France, it is competent to the plaintiff to enforce it by suit here. All the authorities, however, lay it down most distinctly, that the course of procedure ought to be according to the law of the forum where the suit is instituted: see Story's Conflict, §§ 634 a, 685 b. This is a question of evidence, which, as is observed by Coleridge, J., in *Brown v. Thornton*, 6 Ad. & E. 185, 193 (E. C. L. R. vol. 83), "must be decided by the law of this country, although the transaction took place in a foreign one." It is difficult to come to any other conclusion from the words of the 4th section of the statute themselves. It does not require the contract to be in writing and signed by the party to be charged therewith; it is satisfied if there is "some memorandum or note thereof" in writing, and signed. It has always been held that \*818] a letter addressed by the defendant to a *third party*, containing an admission of a contract with the plaintiff, will be enough to charge the former. In this case, it is evident that the letter, not being addressed to the plaintiff, or his agent, cannot constitute the contract itself, but is merely evidence of it. The authorities on that point are thus summed up by Sir E. Sugden,—V. & P. 11th edit. p. 122,—“A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the

before-mentioned rules, be a sufficient agreement to take the case out of the statute. This was laid down by Lord Hardwicke, who said that it had been deemed to be a signing within the statute, and agreeable to the provisions of it. And the point was expressly determined, in the year 1719, by the Court of Exchequer. Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment; and Chief Baron Bury, Baron Price, and Baron Page were of opinion that the letter was a writing within the statute of frauds. And the same doctrine appears to apply to a letter written by a purchaser." So, in *Dobell v. Hutchinson*, 3 Ad. & E. 355 (E. C. L. R. vol. 30), it was held, that, where a contract in writing, or note, exists, which binds one party to a contract, under the statute of frauds, any subsequent note in writing signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.

[JERVIS, C. J.—In the passage you refer to, is not Sir E. Sugden speaking of the 17th section?(a)] He is speaking of a court of equity \*enforcing specific performance of a contract for the sale of [\*819 lands, and therefore must be dealing with the 4th section.(b)]

[JERVIS, C. J.—Some difficulty arises from the observations of the Court of Exchequer in the two cases of *Carrington v. Roots* and *Reade v. Lamb*, that practically the 4th and the 17th sections are the same.] There are many authorities which show that is not correct. In *Crosby v. Wadsworth*, 6 East, 602, where it was held that a contract for the purchase of a growing crop of grass, for the purpose of being mown and made into hay by the vendee, was held to be "a contract or sale of an interest in or concerning land" within the 4th section of the statute of frauds, Lord Ellenborough says: "The statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives, on the ground of such contract and of some supposed breach thereof. But, although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol, so that, if the same had been executed, the parties could have treated it as a nullity; yet, being executory, and as for the non-performance of it no action

(a) "No contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

(b) The cases cited by Sugden are.—*Welford v. Beazeley*, 3 Atk. 503; *Seagood v. Meale*, Prec. Chanc. 560; *Cooke v. Tombs*, 2 Anstr. 420; *Owen v. Thomas*, 3 Myl. & K. 353; *Smith v. Watson*, Bumb. 55; and *Rose v. Cunynghame*, 11 Ves. 550. In *Welford v. Beazeley*, the question was, whether a person subscribing a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of the statute: all the others were cases of specific performance.



could have been by the provisions of the 4th section maintained, we  
 \*820] think it might be discharged before anything was done under it  
 which \*could amount to a part execution of it." In *Laythoarp*  
*v. Bryant*, 2 N. C. 785, 3 Scott, 288, the question was, whether a con-  
 tract signed by the vendee only could be enforced. This court held  
 that it could. Tindal, C. J., there says: "I find no case, nor any  
 reason for saying that the signature of both parties is that which makes  
 the agreement. The agreement, in truth, is made before any signa-  
 ture." And Bosanquet, J., said: "My opinion is founded on the words  
 of the 4th section of the statute, as well taken by themselves as con-  
 trasting them with s. 17. It is said there has been some difference of  
 opinion on the subject in courts of equity; although the preponderance  
 of authority is in favour of the construction we now adopt. I find no  
 doubt in courts of law; but, if there be any, we must revert to the  
 language of the statute,—'No action shall be brought, unless the agree-  
 ment upon which such action shall be brought, or some memorandum  
 or note thereof, shall be in writing, and signed by the party to be  
 charged therewith, or some other person thereunto by him lawfully  
 authorized.' This 4th section does not *avoid* contracts not signed in  
 the manner prescribed; it *only precludes any right of action*. The 17th  
 section is stronger, and avoids contracts not made as the section pre-  
 scribes: yet, even under that section, it has been held sufficient if a  
 contract be signed by the party to be charged." With regard to *Car-*  
*rington v. Roots* and *Reade v. Lamb*, the expressions of the learned  
 judges must be understood with reference to the subject-matter of the  
 suit. In the former, the court held, that though the action was in form  
 an action of trespass, yet it was in effect brought to enforce a con-  
 tract, because, unless there was a valid contract, the replication could  
 not be supported. So, in *Reade v. Lamb*, the expression that the con-  
 tract was void must be understood with reference to the question then  
 before the court, which was, whether the contract was one that was  
 \*821] \*capable of being enforced in a court of law. It is every day's  
 practice, in the courts of equity, to enforce the performance of  
 contracts not in writing, where there has been a part performance.  
 That could not be, if the contract were wholly void. The effect of the  
 4th section of the statute is, that, in order to avoid fraud and perjury,  
 contracts of a given description shall only be proved by some note in  
 writing. [MAULE, J.—The 1st, 3d, and 17th sections of the 29 Car.  
 2, c. 3, differ materially from the 4th. The 1st section enacts that  
 "all leases, estates, interests of freehold, or terms of years, or any  
 uncertain interest of, in, to, or out of, any messuages, manors, lands,  
 tenements, or hereditaments, made or created by livery and seisin only,  
 or by parol, and not put in writing, and signed by the parties so mak-  
 ing or creating the same, or their agents thereunto lawfully authorized  
 by writing, shall have the force and effect of *leases at will only*, and

shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary, notwithstanding,"—subject to the exception in s. 2. The 8d section enacts that "no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law." That section contemplates an operative instrument: it clearly is not providing for evidence merely. Again, the 17th section says that no contract of the descriptions there enumerated "*shall be allowed to be good*," except, &c. The 4th section, however, says, not that an \*agreement which is not in writing shall be void, or shall not be allowed to be good, but merely that *no action shall be brought upon it*. It requires that the agreement, to be the foundation of an action, or some memorandum or note thereof, shall be in writing, and signed. A letter written and signed by the party, containing the terms of the agreement, though addressed to a third person, satisfies the letter, as well as the object of the statute. JERVIS, C. J.—That is the view which Bosanquet, J., takes in *Laythoarp v. Bryant*. Suppose the defendant had written a letter to a third person, saying that he had made such a contract as this with the plaintiff at Calais, but that, being made there, and not in writing, it could not be enforced in this country,—would not that be a sufficient note or memorandum of the contract to satisfy the 4th section? No doubt it would. If the words "whether made in England or elsewhere" had been actually inserted in the statute, the court would have been bound to give effect to them, notwithstanding the comity of nations. In *Lopez v. Burslem*, 4 Moore's P. C. Cases, 300, the statute 5 G. 4, c. 113 (the slave abolition act), s. 29, which enacts that no appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty (except in any Vice-Admiralty Court at the Cape of Good Hope or to the eastward thereof), unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced,—was held to apply to foreigners as well as British subjects. Lord Campbell, in delivering the judgment of the Privy Council, there says: "It is contended that the owners of the cargo are not bound by the enactment, because they are foreigners. The British parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British crown; but it cannot be doubted for a moment that a [\*823 \*British statute may fix a time within which application must be made for redress to the tribunals of the empire. This is matter of

procedure, and becomes the law of the forum. On matter of procedure, all mankind, whether aliens or born subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum. If a law were made upon this subject, working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law, to our government: but, while it remains in force, judges have no choice but to give effect to it. Had it been shown to us ever so clearly, that, in this case, the condition required could not have been complied with, if it has clearly, absolutely, and universally been imposed, we should have no power to dispense with it." [MAULE, J.—In the Sussex Peerage case, 11 Clark & Fin. 85, the Royal Marriage Act, 12 G. 3, c. 11, was held to extend to prohibit the contracting of marriages, or to annul any already contracted, in violation of its provisions, *wherever the same might be contracted or solemnized, whether within the realm of England or without.*] In Davis v. Trevanion, 2 D. & L. 743, it was held that a warrant of attorney executed abroad, must be attested by an attorney, in pursuance of the 1 & 2 Vict. c. 110, s. 9. [MAULE, J.—A warrant of attorney is an instrument which is to be operative entirely in England, and which is altogether inoperative out of England.]

JERVIS, C. J.—I am of opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principles which ought to govern our decision. My Brother Allen admits, that, if the 4th section of the statute of frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the \*other hand, it is not denied by Mr. \*824] Honyman,—who has argued this case in a manner for which the court is much indebted to him,—that, if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the *solemnities* of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the statute of frauds, and contrasting them with those of the 1st, 3d, and 17th sections, this conclusion seems to me to be inevitable. The words of s. 4 are, "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." The statute, in this part of it, does not say, that, unless those requisites are complied with,

*the contract shall be void*, but merely that *no action shall be brought upon it*: and, as was put with great force by Mr. Honyman, the alternative, “unless the agreement, or some memorandum or note thereof, shall be in writing,”—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice. This view seems to be supported by the authorities; because, \*unless we are to infer that the courts thought the agreement itself good, though [825 not made in strict compliance with the statute, they could not consistently have held, as was held in the cases referred to by Sir Edward Sugden, that a writing subsequent to the contract, and addressed to a third person, was sufficient evidence of an agreement, within the statute. It seems, therefore, that both authority and practice are consistent with the words of the 4th section. The cases of *Carrington v. Roots*, and *Reade v. Lamb*, however, have been pressed upon us as being inconsistent with this view. It is sufficient to say that the attention of the learned judges by whom those cases were decided, was not invited to the particular point now in question. What they were considering was, whether, for the purposes of those actions, there was any substantial difference between the 4th and 17th sections. It must be borne in mind that the meaning of those sections has been the subject of discussion on other occasions. In *Crosby v. Wadsworth*, 6 East, 602, Lord Ellenborough, speaking of the 4th section, says,—“The statute does not expressly and immediately vacate such contracts, if made by parol: it only precludes the bringing of actions to enforce them.” Again, in *Laythoarp v. Bryant*, 2 N. C. 785, 3 Scott, 238, Tindal, C. J., and Bosanquet, J., say distinctly that the contract is good, and that the statute merely takes away the remedy, where there is no memorandum or note in writing. I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of the 29 Car. 2, c. 3, relates only to the procedure, and not to the right and validity of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen, it is to be observed that the learned author is there speaking of what pertains *ad vinculum obligationis et solemnitatem*, and not with reference to the mode of \*procedure. Upon these grounds, I am of opinion that this action cannot be maintained, and that the [826 rule to enter a nonsuit must be made absolute.

MAULE, J.—I am of the same opinion. The 4th section of the statute of frauds enacts that “no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall

be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Now, this is an action brought upon a contract which was not to be performed within the space of one year from the making thereof, and there is no memorandum or note thereof in writing signed by the defendant or any lawfully authorized agent. The case, therefore, plainly falls within the distinct words of the statute. It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say that no such contract as before stated shall be of any force; it says, *no action shall be brought upon it*. In their literal sense, these words mean that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done; in terms, therefore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words "no action shall be brought" in the 4th section, are equivalent to the words "no contract shall be allowed to be good," which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, \*827] to substitute the equivalent words \*for those actually used. What we have to construe, is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle: and, if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract. None of the authorities which have been referred to seem to me to be at all at variance with the conclusion at which we have arrived.

TALFOURD, J.—I am of the same opinion. The argument of Mr. Honyman seems to me to be quite unanswerable. That drawn from *Laythoarp v. Bryant* and that class of cases in which it has been held that the 4th section of the statute of frauds is satisfied by a subsequent letter addressed to a third party, containing evidence of the terms of the contract, shows clearly that that section has reference to procedure

only, and not to what are called by the jurists the rights and solemnities of the contract. Rule absolute.

The Courts will not sustain an action on a foreign contract on the mere ground that the *lex loci contractus* gave an action. All that relates to the remedy must be determined by the *lex fori*: *Pickering v. Fisk*, 6 Verm. 102. The plea of the statute of limitations is of the *lex fori*, and promissory notes with ink seals must be treated as specialties where such seals are recognised as good, although they may have been executed in another State by the laws of which they are not specialties: *Watson v. Brewster*, 1 Penna. State Rep. 381; *Dorsey v. Hardesty*, 9 Missouri, 157. A law of New York which would enable a vendor, of whom

goods had been purchased fraudulently on a credit, to maintain assumpsit against the vendee for the price of the goods, before the credit had expired, would be a law affecting the remedy only, and would not apply, so as to enable the vendor to maintain a similar action in Mississippi to recover the price of goods sold in New York: *Galloway v. Holmes*, 1 Douglass, 330. That the remedy is governed by the law of the *forum*; *Smith v. Atwood*; 3 M'Lean, 500; *Wood v. Watkinson*, 17 Conn. 500; *M'Kissick v. M'Kissick*, 6 Humph. 75; *Matherson v. Crawford*, 4 M'Lean, 540.

\*GAPP v. ROBINSON. Nov. 6.

[\*828

A writ of summons issued under the uniformity of process act, expired before the 24th of October, 1852, when the common law procedure act, 15 & 16 Vict. c. 76, came into operation:— Held, that an alias to save the statute of limitations, must issue pursuant to the former act.

LUSH applied for a direction from the court to the masters, as to the renewal of a writ, under the following circumstances:—

The uniformity of process act, 2 W. 4, c. 39, s. 10, enacted that no writ issued by authority of that act should be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* might be continued by alias and pluries, as the case might require, if any defendant therein named might not have been arrested thereon or served therewith: provided always, that no first writ should be available to prevent the operation of any statute whereby the time for the commencement of the action might be limited, unless the defendant should be arrested thereon or served therewith, or proceedings to or toward outlawry should be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, should be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ, should be issued within one such calendar month after the expiration of the preceding writ, &c.

A writ of summons issued under that act on the 8th of June last, and consequently would be in force until the 7th of October.

The common law procedure act, 15 & 16 Vict. c. 76, received the Royal assent on the 30th of June, and came into operation on the 24th of October.

\*829] \*The 10th section of that statute enacts, that "from the time when this act shall commence and take effect, so much of a certain act of parliament, &c. (2 W. 4, c. 39), as related to the duration of writs, and to alias and pluries writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute whereby the time for the commencement of any action may be limited, shall be repealed, *except so far as may be necessary for supporting any writs that have been issued before the commencement of this act, and any proceedings taken or to be taken thereon.*"

And s. 12 enacts, that "where any writ of summons in any such action shall have been issued before, and shall be in force at, the commencement of this act, such writ may at any time before the expiration thereof be renewed under the provisions of, and in the manner directed by, this act; and, where any writ issued in continuation of a preceding writ, according to the provisions of the said act of 2 W. 4, c. 39, shall be in force and unexpired, or where one month next after the expiration thereof shall not have elapsed at the commencement of this act, such continuing writ may, without being returned non est inventus or entered of record according to the provisions of the said act of 2 W. 4, c. 39, be filed in the office of the court within one month next after the expiration of such writ, or within twenty days after the commencement of this act; and the original writ of summons in such action may thereupon, but within the same period of one month next after the expiration of the continuing writ, or within twenty days after the commencement of this act, be renewed under the provisions of and in the manner directed by this act; and every such writ shall after such renewal have the same duration and effect for all purposes, and shall, \*830] if necessary, be subsequently renewed, in the same manner \*as if it had originally issued under the authority of this act."

The plaintiff, after the 24th of October, the day on which the 15 & 16 Vict. c. 76, came into operation, but before the expiration of the time for issuing an alias under the 10th section of the 2 W. 4, c. 39, viz. on the 2d of November, applied for an alias summons, for the purpose of saving the statute of limitations: but the officers doubted whether the renewed writ should, under the circumstances, issue pursuant to the old or the new statute. It was now submitted that the case was not within the terms of the first branch of the 15 & 16 Vict. c. 76, s. 12, the original writ of summons not having been in force when the statute came into operation; nor within the second branch, because it was not a writ issued in continuation of a preceding writ.

MAULE, J.—The case is clearly not within the 12th section of the common law procedure act.

JERVIS, C. J.—I also think this case must be governed by the 10th section of the 2 W. 4, c. 39, and not by the 12th section of the recent statute. I am informed that the masters of this court conferred with

the masters of the Court of Exchequer yesterday upon the subject, and that they came to the conclusion that the case must be dealt with under s. 10.

TALFOURD, J., concurring,

Direction given accordingly.

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**\*HOLMES v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. Nov. 24. [\*831**

A specification of an invention of "an improved turning-table for railway purposes," described the alleged invention "to consist in supporting the revolving plate or upper platform of the turning-table, as also its stays, braces, arms, and supports, on the top of a fixed post, well braced, and resting on or planted in the ground, the top of which post forms a pivot for the table to turn on, while *support-arms radiating from a frame-work* (the weight of which is also sustained on the post) *moving round the bottom part of the post, with friction-rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady* to receive the superincumbent weight of carriages or whatsoever is to be turned upon it." And, after describing the drawings, the specification concluded thus:—"Now, whereas I claim as my invention the improved turning-table hereinbefore described, and such my invention being to the best of my knowledge and belief entirely new, and never before used in England, &c., I do declare this to be my specification of the same, and that I do verily believe this my specification doth comply in all respects, fully and without reserve or disguise, with the proviso in the hereinbefore in part recited letters-patent contained; wherefore I hereby claim to maintain exclusive right and privilege to my said invention:"—

Held, that the specification claimed the whole combination as new; and,—a jury having found that the only novelty consisted of the *suspending-rod* (all the rest having been substantially described in the specification of a patent previously granted to another person),—that the defendant, in an action for an alleged infringement, was entitled to a verdict on a plea taking issue on the sufficiency of the specification.

THIS was an action upon the case for an alleged infringement of a patent. The declaration stated that one William Currie Harrison was the true and first inventor of a certain manner of new manufacture, to wit, "an improved turning-table for railway purposes;" that Harrison duly obtained a patent for his said invention, and enrolled a specification thereof, and afterwards assigned the same to the plaintiff; and that the defendants, after the making of the letters-patent, and after the making of the said indenture of assignment, &c., unlawfully, unjustly, and injuriously, and without the leave, license, consent, or agreement of the plaintiff, and against the will of the plaintiff, worked, used, and put in practice the said invention, and divers, to wit, fifty parts of the said invention,"—and "made, manufactured, and fabricated divers, to wit, five hundred turn-tables and one thousand parts of turn-tables, according to and by means of the said invention,"—and "did counterfeit, imitate, and resemble the said invention, and divers, to wit, one \*thousand parts thereof," and "did make and also [\*832 cause and procure to be made, divers, to wit, fifty, additions to, and divers, to wit, fifty, subtractions from, the said invention, and from divers, to wit, one hundred, parts thereof, whereby to pretend, and whereby the defendants did in fact pretend, themselves to be the



inventors and devisers thereof,"—and "sold, vended, and put off divers, to wit, five hundred, turn-tables, and one thousand parts of turn-tables which had been and were then unlawfully, wrongfully, and injuriously, and without such license, consent, or agreement as aforesaid, made, manufactured, and fabricated according to and by means of the said invention,"—and "did work and use divers, to wit, five hundred, turn-tables which had been and were then unlawfully, wrongfully, and injuriously, and without such license, consent, or agreement as aforesaid, made, manufactured, and fabricated according to and by means of the said invention, and in breach of the said letters-patent and privilege, and also divers, to wit, five hundred, other turn-tables which had been and were then unlawfully, wrongfully, and injuriously, and without such license, consent, or agreement as aforesaid, made, manufactured, and fabricated in imitation of, and so as to counterfeit and resemble, and with divers parts thereof respectively constructed in imitation of and so as to counterfeit and resemble the said invention, and in breach of the said letters-patent and privilege, and did there unlawfully, wrongfully, and injuriously, and without such license, consent, or agreement as aforesaid, work, use, exercise, and put in practice the said invention, and divers, to wit, twenty, parts thereof, in breach of the said letters-patent," &c.

The defendants pleaded,—first, not guilty,—secondly, that Harrison was not the true and first inventor of the said invention in the letters-patent and declaration mentioned,—thirdly, that the alleged invention was not new,—fourthly, that Harrison did not, in and by the said \*833] instrument in writing in the declaration mentioned, particularly describe and ascertain the nature of the alleged invention, and in what manner the same was to be and might be performed. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings at Westminster after last Trinity Term. The defence was, that Harrison's alleged invention was almost entirely copied from an invention which had previously been patented by one Hancock, although Hancock's specification had not been filed at the date of the grant to Harrison; and that Harrison's invention, if there was novelty in any part of it, was not properly described in his specification.

The letters-patent granted to Harrison, and his specification, were put in. The former described the alleged invention as "An improved turning-table for railway purposes." The specification, which was enrolled on the 28th of July, 1841, was as follows:—

"To all to whom these presents shall come, I, William Currie Harrison, of, &c., engineer, send greeting: Whereas, Her present most excellent Majesty Queen Victoria, by her letters-patent under the great seal of Great Britain, bearing date at Westminster, the 28th of January, in the fourth year of Her reign (1841), did, for herself, her

heirs and successors, give and grant unto me, the said W. C. Harrison, her especial license, that I, the said W. C. Harrison, my executors, administrators, or assigns, or such others as I, the said W. C. Harrison, my executors, administrators, or assigns, should any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, within England and Wales and the town of Berwick-upon-Tweed, my invention of 'an improved turning-table for railway purposes;' in which said letters-patent is contained a proviso obliging me the said \*W. C. Harrison, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention, and in what manner the same is to be performed, and to cause the same to be enrolled in Her said Majesty's High Court of Chancery within six calendar months next and immediately after the date of the said in part recited letters-patent, as in and by the same, reference being thereunto had, will more fully and at large appear: Now know ye, that, in compliance with the said proviso, I, the said W. C. Harrison, do hereby declare the nature of my said invention to consist in supporting the revolving plate or upper platform of the turning-table, as also its stays, braces, arms, and supports, on the top of a fixed post, well braced, and resting on or planted in the ground; the top of which post forms a pivot for the table to turn on, while support arms radiating from the frame-work (the weight of which is also sustained on the post) moving round the bottom part of the post with friction-rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady to receive the superincumbent weight of carriages or whatsoever is to be turned upon it: And, in further compliance with the said proviso, I do hereby describe the manner in which my said invention is to be performed, by the following statement thereof, reference being had to the drawings annexed, and to the figures and letters marked thereon, that is to say,—

"Description of the drawing:—Figure 1 is a plan of the table, with the rails, catch, &c., as usual: the dotted lines show the ribs on the under side, to give strength to the plate of the table. Figure 2 is a section of the table complete, showing an upright post connected with a set of arms or frame-work at the bottom, or otherwise fixed as may suit the purpose, and bearing the weight of the table on its top, with arms supporting the extremity \*of the plate in as many places round the plate as shall be found necessary. A is a cap on the top of the upright post, which is to carry the weight of the table b b. The suspending-rods c c pass through the cap a, and are also connected with the table, so that the table can be raised and lowered; and these suspending-rods go down and pass through the friction-roller case d, supporting it by the screw-pins e e, formed at their lower ends: the

bottom parts of the suspending-rods become also the axes for the friction-rollers at the bottom of the post, and are also made to receive the bottom ends of the support arms. The top ends of these arms are connected near the extremity of the plate, and transfer all the stress from the outer sides of the plate, through the arms, on to the suspending-rods, bringing the weight directly on to the top of the post: and it will, therefore, move very much more lightly and easily than with the rollers round the circle, in the ordinary manner,—which is a matter of great convenience as to expedition, but a matter of more importance still when a turn-table is in almost constant motion. On the present or ordinary principle of construction, it is certain to be very soon out of order; but, on this new construction, it is evident, from the very few wearing parts, that it will continue very much longer in use without the liability of derangement, which is a great recommendation to its adoption wherever a turn-table is required. The friction-rollers in the frame at the bottom of the support-arms, are, as will be seen, made to move round the post near the bottom, along with the turning motion of the table, while the post is to be stationary, fixed to a set of braces, *ff*, which, with the bottom of the post, are to be laid on concrete, stone, or brick-work,—economy deciding the choice of the materials,—of such a depth as the nature of the ground may require. The braces \*836] are here shown to be put together in parts, for the convenience of \*making, and also of transportation: they are brought up in an inclined form to connect with the outer ring. Figure 3 has part of the outer ring removed, showing an elevation of the table entire, and the spaces *h* for the braces *f*. Figure 4 is a plan of the braces and outer ring, with the post in its place. Figure 5 is a centre-piece, for connecting the braces with the post, showing a section of the post and also the spaces *h* to receive the braces. Figure 6 is a plan of the rollers and case, and cross-section of the post,—the post being cast hollow. Figure 7 is a section of the end of the brace which goes into the spaces *h* shown in fig. 5.

“Now, whereas I claim as my invention the improved turning-table hereinbefore described, and such my invention being to the best of my knowledge and belief entirely new, and never before used within that part of Her said Majesty’s united kingdom of Great Britain and Ireland called England, her said dominion of Wales, or town of Berwick-upon-Tweed, I do hereby declare this to be my specification of the same; and that I do verily believe this my said specification doth comply in all respects fully and without reserve or disguise with the proviso in the said hereinbefore in part recited letters-patent contained; wherefore, I hereby claim to maintain exclusive right and privilege to my said invention.”

Prior to the grant of the letters-patent to Harrison, viz., on the 18th of December, 1840, a patent had been granted to one Hancock.

for an invention of "Certain improvements in mechanism applicable to turn-tables for changing the position of carriages upon railroads; which improvements are also applicable to castors for furniture and other purposes." In his specification, enrolled on the 28th of June, 1841, Hancock's invention was described to consist,—“First, in the application of antifriction collars to axles, whether vertical or horizontal; secondly, in an improved mode of retaining the \*oil [837 which is to lubricate the same; lastly, in arranging and supporting vertical axles on pivots, so as to sustain heavy weights thereon.”

The following is a description of the drawings, so far as was applicable to turn-tables:—“First, with reference to the application of my said invention to turn-tables for changing the position of carriages upon railroads. Figures 1, 2, 3, 4 (sheet *a*), exhibits my improved turn-table for railways; figure 1 being a plan of the upper side of the table or platform on which the carriages are placed, and figure 2 a plan of the framing, which is sunk into the ground. Figure 3 is an elevation of the entire machine, in which the parts shown in figures 1 and 2 may be seen in their proper positions. Figure 4 is a diametrical and vertical section of figure 3, in the direction indicated by the dotted line 3 3 3 made through figures 1 and 2. The letters of reference wherever they occur indicate the same parts: *a* is a vertical bearing-shaft which is fixed into the foundation-frame *b* by its lower end, which is partly tapered, and having at its upper end a steel centre step *c*: at *d* and *d* are two gun-metal collars which fit loosely round the vertical bearing shaft *a*, and within recesses made in the outer cylinder *e e*: *f* is a circular flange bolted to the centre of the table or platform *g g* at its under side: at the middle of this circular flange *f* is the conical pivot *h*, the apex of which is formed of steel, and works in the steel step *c*: *i i* is a massive flange cast to the outer cylinder *e e*, to which are bolted a series of stay-bars *j j*, the upper ends of which are bolted at equidistant points near the periphery of the table or platform: the effect of these stays is, a general support and stability to the table or platform: at *k k* is a series of rails disposed in the usual manner, for the passage to and fro of the carriages. The action of this very improved turning-table is as \*follows:—A carriage being placed [838 upon the table, the same being turned in the usual manner, the pivot *h* is thereby made to revolve on the steel cap *c*, and with it the whole table, with its stay-bars, around the central bearing-shaft *a*.” After describing the other branches of the invention, the specification proceeded:—“Having now described the nature of my invention of certain improvements in mechanism applicable to turn-tables for changing the position of carriages upon railroads, and illustrated their application to that purpose, and to castors for furniture, and axles for carriages, I wish it to be understood that I do not limit the application

of my said invention to the purposes hereinbefore pointed out; but I claim my said invention as applicable to all kinds of machinery in which axles are employed, such as the collars of lathes, the axles of pulleys, clocks, hinges, and so forth. And I wish it also to be understood that I do not claim as my invention all the parts of the apparatus or articles described in this my specification, as, many such parts are, or may be, in common use. But I do claim as my invention,—first, generally the combination of parts which constitute the turn-table for railways hereinbefore described and separately considered, the loose cylindrical collars and pivots or points smaller than the caps they work in, employed as antifriction mechanism in turn-tables here shown; also the stay-bars radiating from a central vertical shaft or centre of motion, to support the table," &c.

It appeared, that, before Hancock's patent, the mode of turning was by friction-rollers at the outer circumference of the table. The material part of Hancock's improvement consisted in transferring the pressure from the outer edge of the table to the post. The only novelty in the plaintiff's invention consisted of the suspension-rods, which, it was contended, in connexion with the old turn-table, formed a new and useful machine.

\*839] \*On the part of the defendants, it was contended, first, that the specification did not properly describe Harrison's invention,—secondly, that there was no evidence of infringement, all that was proved being, that the defendants had had a turn-table, constructed after Harrison's method, for some time on their premises, but there being no evidence to show how it came there.

A verdict was taken for the plaintiff, with nominal damages, leave being reserved to the defendants to move to enter the verdict for them, if the court should be of opinion, either that the alleged invention was not duly described in the specification, or that there was no evidence of infringement.

*Knowles*, on a former day in this term, obtained a rule nisi accordingly.

*Watson*, *Hindmarch*, and *Price*, showed cause.—The main question is, whether the specification sufficiently describes that which the plaintiff claims to be his invention. The specification does not in terms claim any particular part of the machine as new; but it claims the whole in combination. It does not claim the suspending-rods or their application: it claims the combination of all the parts which constitute the patentee's improved turn-table. The claim is, for a combination or arrangement of machinery, be it old or be it new. It is well settled that an instrument of this sort is not to be construed as a plea would be construed on special demurrer. [JERVIS, C. J.—It is to be read fairly, and as a man possessing an ordinary knowledge of the subject would read it.] Precisely so. The title of the patent is, "*An improved*

turning-table for railway purposes." The patentee in his specification describes his invention to consist in "supporting the revolving plate or upper platform of the turning-table, as also its stays, braces, arms, and \*supports on the top of a fixed post, well braced, and resting [\*840 on, or planted in the ground, the top of which post forms a pivot for the table to turn on, while support-arms radiating from a framework (the weight of which is also sustained on the post) moving round the bottom part of the post with friction-rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady to receive the superincumbent weight of carriages, or whatsoever is to be turned upon it;" the object of this new arrangement being, to throw the entire pressure upon the centre support of the table. And, after minutely describing the drawings, the patentee winds up his claim thus:—"Now, whereas I claim as my invention the improved turning-table hereinbefore described, and such my invention being to the best of my knowledge and belief entirely new and never before used in England, &c., I do declare this to be my specification of the same, and that I do verily believe this my said specification doth comply in all respects, fully and without reserve or disguise, with the proviso in the hereinbefore in part recited letters-patent contained; wherefore I hereby claim to maintain exclusive right and privilege to my said invention." From beginning to end, the claim is, for *an arrangement of the machinery*. [JERVIS, C. J.—The "claim" does not alter the specification. There are many old specifications without any *claim* at all. MAULE, J.—Suppose a man were to invent a new balance for a watch, would a specification describing the entire works of a watch, support a patent taken out for "an improved watch?"] Probably not. [JERVIS, C. J.—Could you add "friction rollers" to Hancock's invention, and call the whole a new combination?] The entire structure and arrangement of the parts of the turning-table are by the plaintiff's method altered. [JERVIS, C. J.—It is somewhat remarkable that the description of the drawings does \*not show the suspension-rods at all.] The inventor does not [\*841 claim them as new, except as part of the general arrangement of the table. [MAULE, J.—In all probability, Mr. Harrison would have specified his patent very differently, if he had been aware of Hancock's.] The case which probably approaches the nearest to this, is, *Sellers v. Dickenson*, 5 Exch. 812.† The title of the patent there was, "an invention of certain improvements in looms for weaving." In his specification, the plaintiff declared that his improvements applied to that class of machinery called power-looms, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom, whenever the shuttle stops in the shed." He then described the manner in which that was done in ordinary looms, and proceeded thus:—"The principal defect in this arrangement, and which my improvement is intended to obviate, is, the frequent breakage of the different parts of the loom, occasioned by

the shock of the lathe or slay striking against the 'frog' (which is fixed to the framing). In my improved arrangement, the loom is stopped in the following manner:—I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the swell; but, instead of its striking against a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft at the same time that a projection on the lever strikes \*842] against the 'spring-handle,' and shifts \*the strap; simultaneously with these two movements, the lower end of the vertical beam causes a break to be brought into contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving;" and, amongst them, he claimed a novel arrangement of apparatus for throwing the loom out of gear, when the shuttle failed to complete its course. In the defendant's apparatus, the clutch-box was not used, but, instead of it, the stop-rod finger acted on a loose piece or sliding frog; and, instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and, by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connexion with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's: and it was held, upon these findings,—first, that the specification was good,—secondly, that the defendant had infringed the patent. [MAULE, J.—The specification there pointed out what was new and what old.] In the present case, it was unnecessary to distinguish between what was old and what new, the claim being for a combination or arrangement, and nothing else. In *Cornish v. Keene*, 3 N. C. 570, 4 Scott, 387, 1 Webster's P. C. 512, 513, a patent was taken out "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes," and the patentee in his \*843] \*specification described his invention in general terms to be designed for the production of an elastic web-cloth, or other manufactured fabric, for bandages and for such articles of dress as the same

might be applicable to: he then described more particularly three distinct objects which he proposed. The third object proposed by the patentee, was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of India rubber, coated or wound round with filamentous material:" he afterwards described the mode of effecting the third object to be, "by introducing into the fabric threads or strands of India rubber which had been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine, or otherwise; these strands of India rubber being applied as warp or weft, or as both, according to the direction of the elasticity required; that, by thus combining the strands of India rubber with yarns of cotton, flax, or other non-elastic material, he was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportion of the elastic and non-elastic material." And he added, "that the strands of India rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent; and, being in that state introduced in the fabric, they acquired their elasticity by the application of heat after the fabric was made." It was held that this invention was properly the subject-matter of a patent, and that it was sufficiently described, as above. There was no publication of Hancock's patent to the world until the filing of his specification, which did not take place until nearly six months after Harrison's patent was taken out. Harrison, therefore, was under no obligation to define what was old and what new in his invention, to the extent he must under other circumstances have done. [JERVIS, [\*844 C. J.—The specification relates back to the date of the patent.] So far as it confers the right, no doubt it does. [MAULE, J.—What does Harrison claim? Does he not claim the suspending-rods?] He claims the suspension of the table on the top of the post, and nothing more. [MAULE, J.—Does he not claim the support-arms as contributing to that?] No otherwise than as part of the combination of mechanism. In *Russell v. Cowley*, 1 C. M. & R. 864,† 1 Webster's P. C. 465, a patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation: a later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril: and it was held that the court, taking the whole of the latter specification together, would infer that the maundril was not to be used; and that the latter patent was good. There was nothing in the specification to show that the leaving out the maundril was the subject of the patent. In *Haworth v. Hardcastle*, 1 N. C. 182, 4 M. & Scott, 720, 1 Webster, 480, the plaintiff obtained a patent for machinery adapted to facilitate the drying of calicoes, &c.: the specification, after describing the mode of hanging out the cloth for the purpose of drying it, also stated that



it might be taken up again when dry, by a contrary motion of the machinery. In an action for an invasion of the patent, the jury found that the invention was new, and useful upon the whole, and that the specification was sufficient for a mechanic properly instructed to make a machine, and that there had been an infringement of the patent; but they also found that the machine was not useful *in some cases* for taking up goods: and the court refused to set aside a verdict entered for the plaintiff on this finding. In the course of the specification, the patentee said: "I construct the stove or \*845] drying-house in a manner nearly similar to that at present in use; and I arrange the rails or staves (over which the cloth or fabric is intended to be hung or suspended) near to the upper part of the stove or drying-house:" and Tindal, C. J., in delivering the judgment of the court, said,—“We think, upon the fair construction of the specification, the patentee does not claim as part of his invention either the rails or staves over which the calicoes and other cloths are to be hung, or the placing them at the upper part of the building. The use of rails or staves for this purpose was proved to have been so general before the granting of this patent, that it would be almost impossible *a priori* to suppose that the patentee intended to claim what he could not but know would have avoided his patent; and the express statement he makes, ‘that he constructs the stove or drying-house in a manner nearly similar to those which are at present in use, and that he arranges the rails or staves on which the cloth or fabric is intended to be hung or suspended, near to the upper part of the said stove or drying-house,’ shows clearly that he is speaking of those rails or staves as of things then known and in common use; for, he begins with describing the drying-house as *nearly similar* to those in common use: he gives no dimensions of the rails or staves, no exact position of them, nor any particular description by reference, as he invariably does when he comes to that part of the machinery which is peculiarly his own invention.” In *Newton v. The Grand Junction Railway Company*, 5 Exch. 331, 334,† Pollock, C. B., says: “I think the jury were correctly told that they were to consider whether the invention was new as a whole,—not whether it was new as to every part; because, in modern times, that is a novelty very rarely met with: the more general subject of a patent now is, some new combination or new application.” And Alderson, B., said: “In considering whether the invention is new, \*846] the proper mode is, to take the specification altogether, and see whether the matter claimed as *a whole* is new.” That there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials, was held to be clear law, by Lord Eldon, in *Hill v. Thompson*, 3 Meriv. 622, 629. [JERVIS, C. J.—The specification must give reasonable information. Suppose a mechanic or engineer, wishing to make a turn-table, looked at Harrison’s specification, would he not be thereby

deterred from making it with support-arms and friction-rollers?] Any workman of competent skill would see at once that the suspension on the centre of the table could not be produced by the support-arms. In *Harmar v. Playne*, 11 East, 101, one having obtained a patent for a certain manufacturing machine, of which he duly enrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in which the grant of the former patent was recited; and the letters-patent contained the usual condition, that it should be void if patentee did not, within one month, enrol a specification *particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed*: and it was held, that a specification containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition. Lord Ellenborough there says: "The difficulty which presses most, is, whether this mode of making the specification be not calculated to mislead a person looking at it, and induce him to suppose that the term for which the patent is granted may extend to preclude the imitation of other parts of the machine than those for which the new patent is granted, when he can only tell by comparing it with \*some other patent, what are the new and what are the old [\*847 parts: and, if this may be done by reference to one, why not by reference to many other patents, so as to render the investigation very complicated? It may not be necessary, indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement; but, on many occasions, it may be sufficient to refer generally to them. As, in the instance of a common watch; it may be sufficient for the patentee to say,—take a common watch, and add or alter such and such parts; describing them. And, when Lord Mansfield said, in *Liardet v. Johnson*, Bull. N. P. 76, that the meaning of the specification was, that others might be taught to do the thing for which the patent was granted, it must be understood, to enable persons of reasonably competent skill in such matters to make it: for, no sort of specification would probably enable a ploughman, utterly ignorant of the whole art, to make a watch." [MAULE, J., referred to *Savory v. Price*, 1 Webster's P. C. 83, n., R. & M. 1 (E. C. L. R. vol. 21). There, the plaintiff had a patent "for a method of making a neutral salt or powder possessing all the properties of the medicinal spring at Seidlitz, under the name of Seidlitz Power." The specification gave three distinct recipes for preparing the ingredients, and then directed two scruples of each of the three ingredients resulting from these recipes, to be dissolved in half a pint of water, in order to produce the imitation of

Seidlitz water. It was proved, that, by following the directions given in the specification, the result was obtained, and that it was new and useful. It appeared that the three recipes were only common processes for preparing three well-known substances, viz. Rochelle salts, carbonate of soda, and tartaric acid, which were sold in shops before the date of \*848] the patent; and those three substances being used as \*directed, constituted the patent "Seidlitz Powder." The specification did not give any name to the ingredients resulting from the three recipes, but gave those recipes without comment, as if they were part of the method of making the Seidlitz Powder. And Abbott, C. J., said: "It is the duty of a patentee to specify the plainest and most easy way of producing that for which the patent is granted, and to make the public acquainted with the mode which he himself adopts. By reading this specification, we are led to suppose a laborious process necessary to the production of the ingredients, when in fact we might go to any chemist's shop, and buy the same things ready-made. The public are misled by this specification, which tends to make people believe that an elaborate process is essential to the invention: it cannot be supported." So, here, the proper way of specifying Harrison's "improved turn-table," would have been, to take the old turn-table, and point out specifically the particular improvements he makes in it.] It is submitted that the patentee sufficiently complies with the proviso, where his invention consists in a mere new combination or arrangement of known parts of a machine, when he describes the whole machine as it is described here. It would be impossible otherwise to make it intelligible.

*Knowles and Webster*, in support of the rule.—This specification is clearly insufficient. It is not denied that a patent may be taken out for a novel arrangement of machinery, the whole of which is old, provided a new and useful result be thereby produced. Here, no new arrangement of machinery is pointed out. All that Harrison in fact does, is, to add suspending-rods to Hancock's turn-table. The jury have expressly found that the sole novelty consisted of the suspending-rods. Can it be said that this specification discloses that? In *Bovill* \*849] *v. Moore*, Dav. P. C. 398, Gibbs, C. J., laid it \*down, that, if a patentee in his specification had exceeded the limits of what he had invented, and of which he was entitled to the sole privilege, though in other respects there might be no objection to his patent, that would overturn it, for, he would not then have registered (enrolled) a specification of his invention; it would be irregular in having exceeded the limits of the invention. And his lordship afterwards said, that, if the patentee had in his specification asserted to himself a larger extent of invention than belonged to him; if he stated himself to have invented that which was well known before, then the specification would be bad,

because it would affect to give him, through the means of the patent, a larger privilege than could legally be granted to him. In this case, the invention was stated to be, of a machine or machines for manufacturing lace, and the specification described the whole machine, without pointing out any particular part or parts of it as the invention of the patentee: and the Lord Chief Justice held, that, if a combination of a certain number of the parts of the machine up to a given point had existed before the date of the patent, and if the patentee's invention sprung from that point, and added other combinations to it, then the specification, stating the whole machine as his invention, was bad. That is precisely this case. His lordship left it to the jury to say whether they thought the patentee had in his specification described an invention to a greater extent than the proof went to establish: and, in answer to an observation by a jurymen, that, even if the patentee had claimed too much, inadvertently, and not fraudulently, yet he must answer for his inadvertence. The jury found a verdict for the defendant; and, upon a motion for a new trial, this court approved of the direction given to the jury, and refused to grant even a rule nisi: 2 Marsh. 311 (E. C. L. R. vol. 4). Mr. Hindmarch, in his treatise on the law of patents, p. 191, thus disposes of *Harmar v. Playne*: [\*850 —“There is one case, *Harmar v. Playne*, in which it was held that a specification was sufficient, although it could not be ascertained what the patentee's improvements were, except by comparing the specification with a prior specification which had been enrolled by the same patentee, and to which he referred. The circumstances of that case were peculiar, and the decision does not break in upon the principle of any of the cases which have been cited.” In *Jessop's case*, cited in *Boulton v. Bull*, 2 H. Bl. 489, a specification of an invention of a particular movement of a watch, was held void because it extended to the whole watch. The main object of the improvement, both in *Hancock's* patent, and in *Harrison's*, was, to get rid of the friction-rollers at the outer edge of the platform of the turn-table. The claim to the suspension-rods in *Harrison's* specification was evidently an after-thought.

They were proceeding to argue the second question,—viz., whether the circumstance of the defendants' having a turn-table, made after the manner of *Harrison's*, and using it for three or four years, without any actual proof that the article had been made to their order, amounted to an infringement of the patent,—referring to the 5th and 6th section of the statute of monopolies, 21 Jac. 1, c. 3, and to the case of *Chanter v. Dewhurst*, 12 M. & W. 823,†(a) when the Lord Chief Justice inti-

(a) The cases and authorities upon this point, which were cited for the plaintiffs, were,—The statute of monopolies, 21 Jac. 1, c. 3; 3 Inst. 181, 184; *Hindmarch on Patents*, pp. 53—55; *Gibson v. Brand*, 4 M. & G. 179, 4 Scott, N. R. 844, 1 Webster, P. C. 631; *Stead v. Anderson*, 4 C. B. (E. C. L. R. vol. 56); *Caldwell v. Van Vliessengen*, 21 Law J., N. S., Ch. 97; *Novello v. Sudlow*, ante, p. 177.

mated, that the point was upon the record, and that, as the court were prepared to hold the specification to be bad, it could hardly be worth while to argue the matter further here.

\*851] \*JERVIS, C. J.—The course which the argument has taken renders it unnecessary for the court to express any opinion upon the difficult question which has been raised as to the infringement of the patent. As to the other point in the case, I am clearly of opinion that the rule should be made absolute. There is no question as to the principle which is to govern the court in coming to a decision. It is admitted, as a general proposition, that a patentee must in his specification correctly describe the nature of his invention, or in such a manner that a person of ordinary understanding may on reading it see what is claimed as new, and what is old: and it is also admitted that a patent may be obtained for a combination of known instruments or parts, provided it is properly described. The simple question then is, regard being had to these general principles, what is the proper construction of this specification. In *Russell v. Cowley*, which was cited for the plaintiff, although it is true that Jones and James had specified a portion of the same method of making iron tubes, yet, that which was stated in Whitehouse's specification substantially to be the invention for which the patent was obtained, being the making of iron tubes without the use of a maundril, by passing the metal at a welding heat through a scorpion or ring, the court, proceeding upon the well-known rule, ascertained that to be what in reality the patentee claimed. So, in *Haworth v. Hardcastle*, 1 N. C. 182, 4 M. & Scott, 720 (E. C. L. R. vol. 30), the court said it was manifest, on reading the specification, that, when the patentee said that he used the ordinary stove, slightly varied, and that he suspended the rails and staves a little above the stove, he was speaking, not of what he claimed as a new invention, but of the application of a known drying-stove, and of a known method of suspending the rails and staves; and accordingly they applied the general rule.

\*852] The same may be said as to the case of *Sellers v. \*Dickenson*, where the patentee stated that he applied his invention to the old lever. So, in *Newton v. The Grand Junction Railway Company*, it was objected that the patentee in his specification appeared to claim the application of hard and soft metal, to prevent friction: but the court held, that, though that was used as part of the process, the invention was, the fixing of the soft metal in the interior of the wheel, by the adhesion of the alloy and the use of flanges; and therefore that the patentee did in truth sufficiently specify what was new and what was old. The same may be said of *Harmer v. Playne*, where it was held that a person who had obtained a patent for a machine, and afterwards obtained another patent for improvements therein, sufficiently specified his improvements, by describing the whole machine so improved, without distinguishing the new improved parts from the

old, or referring to the old otherwise than by the recital of the first patent in the second,—again adopting the general principle I before stated. It is impossible for any one to read this specification without seeing that it claims what one would naturally have expected would be claimed. Harrison did not know at the time his specification was drawn what had been invented by Hancock; therefore he claims the whole as new. He takes out his patent for “an improved turning-table for railway purposes.” The surface-rails and catches are all old; but Harrison, by applying certain supporting-rods or arms in a new way, constructs what he describes as “an improved turning-table.” He goes on in his specification to announce the general principle of his invention to consist “in supporting the revolving plate or upper platform of the turning-table, as also its stays, braces, arms, and supports, on the top of a fixed post, well braced and resting on or planted in the ground; the top of which post forms a pivot for the table to turn \*on, while support-arms radiating from the frame-work (the [858 weight of which is also sustained on the post) moving round the bottom part of the post with friction-rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady to receive the superincumbent weight of carriages or whatsoever is to be turned upon it.” He then goes on to describe how he does it. He does it by taking the old revolving plate or platform, with its rails and catches, &c., and support it on a post the top of which forms a pivot, which, for aught that appears, may be new, with support-arms radiating from a frame-work moving round the bottom of the post with friction-rollers, and fastened to the outer edges of the plate; each of these being described as new, or, at least, not being stated to be old. The jury found that the post, the arms, and everything except the suspending-rods, was old. In order to make his specification good, either for an improvement of an old machine, or for a new combination, Harrison should have said,—“My principle is, to suspend the revolving plate or platform on a post, with braces, arms, and supports,” and then, going through Hancock's patent, and describing all that as old, he should have gone on to say,—“to this I add suspending-rods, for the purpose of bringing the bearing on to the centre of the table.” No one can read this specification without seeing that this is in truth the meaning of it, and that the patentee supposes the arms to be new as well as the suspending-rods,—in short, that all is new except the table, the rails, and the catches, which by means of the suspending-rods he converts into a new and improved suspended turn-table. That being so, he clearly does not in my opinion comply with the rule which requires the patentee distinctly to state what is new and what is old. In my judgment, therefore, the specification is insufficient, and the rule to enter a verdict for the defendants must be made absolute.

\*854] \*MAULE, J.—I am of the same opinion. The construction of this specification does not, I think, present any very great difficulty. Reading it with the mere desire to know what it is the person who drew it meant, it seems clear to my mind that he meant to claim an improvement in turn-tables, in those parts which lie below the surface or platform, and which afford support to the table, and distribute the weight it has to bear. All those parts are described together, without making any distinction between the one and the other: all are described indiscriminately as comprising his invention. There is nothing said about one of these parts, as putting it on a different footing from any other part: what, therefore, is impliedly said about one part, is said about every other part. If it is impliedly said in the specification that the suspending-rods are new and an improvement on the old turning-table, the same implication arises as to every other part. The true meaning of the specification is, that there is as much novelty in one part as in another. That is quite consistent with the hypothesis of the plaintiff's counsel,—that Harrison never heard of Hancock's patent. No doubt, Harrison drew his specification without reference to Hancock's patent, and *bonâ fide* believing that the whole of what he was describing was his own invention. Without looking out of the specification, it appears to me to be manifest that the patentee claims as his invention the whole of what he is describing. And upon the evidence, and the finding of the jury thereon, it is equally plain that the whole was not his invention. The plaintiff now says that Harrison's invention consisted of an improvement of Hancock's, by applying the suspending-rods to the table, so as to throw all the weight on the post: and that, he says, is properly described in the specification. I think it is not. It is extremely improbable that it should have \*855] been. The patentee has, in truth, described one thing in his \*specification, and has invented another thing. By the arrangement of the parties, we are relieved from giving any opinion upon the other point, viz. the question of infringement, though I must confess I, individually, do not entertain the slightest doubt upon it.

WILLIAMS, J.—I am entirely of the same opinion, and for the reasons already expressed by my Lord and my Brother Maule. I will only add, that, in coming to this conclusion, we are not acting upon any new doctrine, but are only applying the well-known and established rule of law to the construction of the specification before us.

TALFOURD, J.—I am of the same opinion upon the only point which the court is called upon to decide, and about which, I believe, there has not during the whole course of the argument existed any real doubt in the mind of any one of us.

A discussion then arose as to the particular issue on which the verdict was to be entered for the defendants,—their counsel insisting that they

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were entitled to have it entered on the issue joined on the plea of want of novelty, as well as on that joined on the plea of the want of a specification: but ultimately the court directed that the rule should be absolute to enter a verdict for the defendants on the fourth issue only.

Rule accordingly.

END OF MICHAELMAS TERM.





# I N D E X

TO

## THE PRINCIPAL MATTERS.

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### ACCORD AND SATISFACTION.

*By Stranger.*

In *assumpsit* for work and labour, the defendants pleaded,—that the money mentioned in the declaration accrued due to the plaintiff under an agreement for the building of a church; that, the plaintiff having suspended the work, another agreement was entered into between him and one A., under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work, and to rely for the residue of the contract price upon certain subscriptions which were to be raised: and that A. duly made, and the plaintiff received, the payments stipulated for by the second agreement, in satisfaction and discharge of the original agreement between the plaintiff and the defendants, and of the performance thereof by the latter:—Held, that the plea was bad in substance, inasmuch as it did not show that the agreement made by A., and the payments under it, were intended to be made for the benefit of the defendants, and that they adopted A.'s acts. *James v. Isaacs*, 791

### ACCOUNT.

1. A. and B., tenants in common in fee, made a joint demise of land to C., with a general *reddendum*, not saying to whom the rent was payable. A. died on the 15th of March, 1848, and B. received the half-year's rent due at the following Lady-Day, less 12s. 6d., which he deducted as the share of A.'s heir, for the period between A.'s death and the time the half-year's rent became due:—Held, that,

although the words of the demise were joint, the reversions were several, and the rent followed the reversions; and, consequently, that the heir of A. was entitled to the moiety of the half-year's rent accruing at Lady-Day, 1848, and might maintain an action of account against B., as bailiff, upon the statute 4 Anne, c. 16, s. 27, for receiving more than his just share. Held, also, on motion in arrest of judgment, that the declaration was good without an averment that a reasonable time had elapsed between the request to account and the commencement of the action: *Beer v. Beer*, 60

2. Assignment of auditors. *Id.* 82

### ACCOUNT STATED.

*Evidence of.*

A promissory note was given by the defendant to the plaintiffs in 1840, payable, five years after date, for value received:—Held, that it was evidence of an account stated, against which the statute of limitations did not commence running until the maturity of the note. *Fryer v. Roe*, 437

### ACT OF BANKRUPTCY.

*See* BANKRUPT, II.

### AFFIDAVIT.

*I. Instituting.*

The defendant was described in the writ as "H. W. Bauerman," and entered an appearance as "Henry William Bauerman, sued as H. W. Bauerman:" upon a collateral mo-

tion, his affidavit was intituled "*Hillary John Bauerman* (his true name), sued as *Henry William Bauerman*:"—Held, irregular. *Baldwin v. Bauerman*, 152

#### II. Description of Deponent.

In an affidavit verifying the notes of the judge of an inferior court, the deponent described himself as "*Thomas Sanger*, clerk to *Edward James, Esq.*, barrister-at-law, and assessor of the Court of Passage of the borough of Liverpool," without giving his place of residence:—Held, insufficient. *Winck v. Williams*, 416

#### III. On Motions.

1. *For Judgment as in Case of a Nonsuit*.]—Upon a motion for judgment as in case of a nonsuit, it is enough if the affidavit shows a default, without going on to negative that the plaintiff has since proceeded to trial: that fact should come from the other side. *Blackman v. Asplin*, 453
2. *To set aside Proceedings*.]—Upon a motion to set aside a step in a cause, on the ground that a term's notice of proceeding was necessary,—the affidavits must distinctly allege that a term's notice has not been given: it is not enough to state "that no step or proceeding in the cause" has been taken. *Minchiner v. Martin*, 455
3. *Under 3 & 4 W. 4, c. 74, s. 91*.]—An affidavit to found a motion under the 3 & 4 W. 4, c. 74, s. 91, must describe the deponent as "wife of," &c., even though it disclose circumstances showing a well-grounded belief that the husband is dead. *Ex parte Lydia Sparrow*, 334

#### IV. Stale Affidavit.

The court refused to grant a distringas to compel the defendant's appearance, upon an affidavit four days old. *Drinkwater v. Mills*, 452

#### AGREEMENT.

I. *Construction of*.—See *LANDLORD AND TENANT*, I. 1.

II. *Stamp on*.—See *STAMP*.

#### ALLOTTEE.

See *RAILWAY COMPANY*, VI.

#### APPORTIONMENT.

4 W. 4, c. 22.

The statute of apportionment, 4 W. 4, c. 22, does not apply as between the personal representative and the heir of a tenant in fee. *Beer v. Beer*, 60

#### ARRANGEMENT.

*Deed of*.—See *BANKRUPT*, I.

#### ASSESSOR.

*Of Borough Court*.—See *MUNICIPAL CORPORATION*.

#### ASSIGNMENT.

I. *Fraudulent*.—See *BANKRUPT*, II.

II. *By Felon*.—See *FELON CONVICT*.

#### ATTESTING WITNESS.

See *STAMP*, I.

#### ATTORNEY.

*Bill of Costs*.

*Name of Cause and Court*.]—A., an attorney in London, enclosed a writ of summons, and subsequently a notice of declaration and particulars, to B., an attorney in the country, for service. B., by letter, apprised A. of the service, annexing the account of his charges. The name of the cause was mentioned in the letters, but not the court in which the business was done:—Held, that the bill gave A. sufficient information, and that the statute 6 & 7 Vict. c. 73, s. 37, was complied with. *Cusens v. Graham*, 398

#### AWARD.

*Under Local Enclosure Act*.—See *ENCLOSURE ACT*.

#### BAILIFF.

See *ACCOUNT*.  
*SHERIFF*.

#### BAILMENT.

See *DEED*, II.

#### BANKRUPT.

I. *Deed of Arrangement under 12 & 13 Vict. c. 106*, s. 224.

A deed of arrangement between an insolvent trader and his creditors, under the 224th section of the 12 & 13 Vict. c. 106, is not binding upon those creditors who have not executed it, unless it provides for the entire distribution of the trader's estate and effects amongst his creditors, as in bankruptcy. *Fisher v. Bell*, 363

#### II. Fraudulent Conveyance.

A trader, in consideration of a past debt of 240*l.*, and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer:—Held, that, inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily de-

feated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy within the statute 12 & 13 Vict. c. 106, s. 67. *Graham v. Chapman*, 85

#### BARON AND FEME.

See HUSBAND AND WIFE.

#### BETTING.

See GAMING.

#### BILL OF EXCHANGE.

I. *Presumption as to Time of Acceptance*.—See INFANT.

II. *Plea of Payment by Drawer*.—See PLEADING, II. 3.

III. *Payment of Freight by*.—See SHIP AND SHIPPING, II.

#### IV. *Plea of Want of Consideration*.

A plea of want of consideration, in an action on a bill of exchange, must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned. *Boden v. Wright*, 445

#### V. *Illegality of Consideration*.

*Gaming*.—A. and B. jointly made bets with third persons on a horse-race. B. received the money, and gave A. a bill accepted by C. (who was no party to the betting) for his share:—Held, that A. was not precluded by the 8 & 9 Vict. c. 109, s. 18, from suing C. upon the bill. *Johnson v. Lansley*, 486

#### VI. *Evidence of Account Stated*.

A promissory note was given by the defendant to the plaintiffs in 1840, payable, five years after date, for value received:—Held, that it was evidence of an account stated, against which the statute of limitations did not commence running until the maturity of the note. *Fryer v. Roe*, 437

#### BILL OF LADING.

See CHARTER-PARTY.

#### BOOK.

See COPYRIGHT.

#### BOROUGH COURT.

*Assessor of*.—See MUNICIPAL CORPORATION.

#### BROKER.

*Payment of Freight by*.—See SHIP AND SHIPPING, II.

#### CASE.

##### I. *For Negligence*.

1. *In Driving a Cart*.—In an action in a

county court, for negligently driving a horse and cart, the plaintiff having simply proved the fact of a collision, under circumstances which might or might not amount to negligence,—the defendant proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, and the driver thrown out, when the horse started off, and ran against and injured the plaintiff's horse. The judge of the county court, upon this evidence, ordered a verdict for the plaintiff,—“being of opinion that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner.” An appeal against his decision was dismissed with costs. *Templeman, App., Haydon, Resp.* 567

2. *Navigating a Ship*.—By an act for improving and maintaining a harbour, the commissioners were empowered to build or provide steam-tugs for towing vessels into or out of the harbour, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of certain steam-vessels to perform this duty for them at certain specified rates of charge; the commissioners paying them in addition a certain sum annually, and the vessels being placed under the direction and control of the harbour-master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of the tug, whilst being towed into the harbour, the owner brought an action in the county court against the harbour commissioners, and, under the direction of the judge, recovered a verdict:—The court, on appeal, set aside the verdict,—holding that the decision of the judge could not, upon any inference which could legitimately be drawn from the facts before him, be correct in point of law. *Cuthbertson, App., Parsons, Resp.* 364

3. *Against Ferrymen*.—The lessees of a ferry provided steamboats for the conveyance of passengers, goods, and cattle from A. to B., and also slips for landing and embarking, which were (generally) sufficient for the purpose:—Held, that they were liable for an injury sustained by the horse of a passenger, in consequence of the side-rail of the landing-slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control and management of its owner. *Willoughby, App., Horridge, Resp.* 742

##### II. *For False Imprisonment*.

The 2 & 3 Vict. c. 47, s. 54, imposes a penalty not exceeding 40s. for, amongst other things, “furious driving” in a thoroughfare; and s.

63 empowers any constable of the metropolitan police district to take into custody, without warrant, any person who, *within view of such constable*, shall offend in any manner against the act. In an action in a county court against constables for a tort in taking the plaintiff into custody on a false and unfounded charge of furiously driving a horse and gig, to the danger of the passengers in a public highway,—the plaintiff, in stating his case, admitted that he had been taken before two justices, convicted, and fined 20s., and that he had paid the penalty, and had not taken any steps to impeach the validity of the conviction. The judge thereupon asked the defendants if they could prove the conviction; and they accordingly put in an examined copy, which stated the offence, but did not allege that it was committed “*within view of the constables*.” The judge, being of opinion, that, “*under the circumstances, the conviction was an answer to the plaintiff’s claim for damages*,” directed the jury to find for the defendants:—Held, a mis-direction. *Justice, App., Goeling, Resp.* 39

### III. *Against a Sheriff for Extortion*.—See SHERIFF.

### CHARTER-PARTY.

#### *Construction of, Lien for Freight.*

By a charter-party, it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers’ factors, and proceed therewith to London, and there deliver the same on being paid freight “a lump sum of 2800*l.*, in full of all charges.” At the end of the charter-party was the following clause,—“*The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any.*” Under this charter-party, the charterers shipped at Penang goods of their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honour bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question:—Held, that the owners had a lien upon the goods for the entire lump freight. *Gledstanes v. Allen*, 202

### COMMITMENT.

*Warrant of*.—See COUNTY COURT, II.

### COMMON LAW PROCEDURE ACT.

#### *Order under s. 17.*

1. An order that the plaintiff be at liberty to proceed upon a quasi service of the writ of summons, under the 15 & 16 Vict. c. 76, s. 17, which is given in lieu of the old proceeding by distringas to compel appearance,—is absolute in the first instance, except under special circumstances. *Barringer v. Handley*, 720
2. Whether the 51st section of the 15 & 16 Vict. c. 76, is retrospective,—*quære?* *James v. Isaacs*, 794
3. A writ of summons issued under the uniformity of process act, expired before the 24th of October, 1862, when the common law procedure act, 15 & 16 Vict. c. 76, came into operation:—Held, that an alias to save the statute of limitations, must issue pursuant to the former act. *Gapp v. Robinson*, 828

### COMPANY.

*See* RAILWAY COMPANY.

### CONSIDERATION.

*Want of Illegality of*.—See BILL OF EXCHANGE, IV.,

### CONSISTORIAL COURT.

*See* PROHIBITION.

### CONTRACT.

#### *I. Construction of.*

1. A contract under seal recited that the defendants, a railway company, were “desirous of being supplied with 350,000 sleepers of Dantisc or Memel timber.” This contract was based upon a specification, prepared by the company, in which it was stated, that, “the number of sleepers required under this specification is, 350,000; one-half will have to be delivered in 1847, and the remainder by Midsummer, 1848;” that “the deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge or other vessel, as may be directed by the resident engineer;” and that the payments were to be made upon the engineer certifying the due delivery of each cargo.

By the contract, the plaintiffs covenanted to supply the company with 350,000 sleepers of the quality and description mentioned, and to deliver them within the times mentioned in the specification, “as and when, and in such quantities, and in such manner, as the engineer of the company should, by order or requisition in writing, from time to

time, within the period limited by the specification, direct or require." The engineer was to be at liberty, at any time before the complete execution of the contract "by the delivery of the whole number of 350,000 sleepers," to alter their size, form, or construction, or to vary the times of delivery "of any of the said sleepers which should not then have been delivered." And the defendants, in consideration of the premises, covenanted to pay to the plaintiffs, "for or in respect of the said sleepers hereinbefore contracted to be supplied," a certain price, upon their engineer certifying the due delivery of each cargo. And it was further agreed that 2000*l.* of the price should be retained by the company until two months after their engineer should have certified that "the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors, shall have been supplied:"—

Held, by the Exchequer Chamber,—affirming the judgment of the court below,—that this was a positive contract by the plaintiffs to supply, and by the defendants to take and to pay for, the whole number of 350,000 sleepers; and that the plaintiffs were entitled to notice of the times when the sleepers would be required. *The Great Northern Railway Company v. Harrison*, 576

2. The third plea traversed an averment in the declaration that the defendants had notice that the plaintiffs were ready and willing to supply the sleepers, and alleged that the defendants had no notice of any sleepers being ready for them at the port of delivery:—Held, that the allegation of readiness and willingness was unnecessary, for, that the plaintiffs were not bound to deliver until they received the orders or directions of the company's engineer; and, consequently, that,—the jury having found that issue for the defendants,—the plaintiffs were entitled to judgment non obstante verdicto thereon, *Id.*

### III. On behalf of Joint-Stock Company.

A contract entered into "on behalf of" a joint-stock company, within the 7 & 8 Vict. c. 110, s. 44, means, a contract by which the company contracts to do something: and that section does not prevent the company from enforcing against third parties a contract which is unilateral only, and which (though they are expressed to be parties to it) has not been executed by the company. *The British Empire Mutual Life-Assurance Company v. Browne*, 723

### CONVEYANCE.

By a Married Woman,—See HUSBAND AND WIFE.

### COPYRIGHT.

#### Infringement of.

By the 2d section of the copyright act, 5 & 6 Vict. c. 45, "copyright," is defined to be "the sole and exclusive liberty of printing or otherwise multiplying copies" of any book, &c.: subsequent sections regulate the duration of copyright; and s. 25 enacts that "it shall be deemed personal property, transmissible by bequest, and, in case of intestacy, be subject to the law of distribution."

The 15th section enacts, "that, if any person shall, in any part of the British dominions, print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause, &c., or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, shall be liable to a special action on the case at the suit of the proprietor of such copyright:"—

Held, that a publication of a piece of music, not for sale or hire, but by the gratuitous distribution of lithographed copies amongst the members of a musical society, was a publication for which the defendant was liable,—as for an invasion of the property of the proprietor therein,—independently of the 15th section of the statute. *Novello v. Siddle*, 177

### CORPORATION.

See MUNICIPAL CORPORATION.

### COSTS.

#### I. Delivery of Bill.

A., an attorney in London, enclosed a writ of summons, and subsequently a notice of declaration and particulars, to B., an attorney in the country, for service. B., by letter, apprised A. of the service, annexing the account of his charges. The name of the cause was mentioned in the letters, but not the court in which the business was done:—Held, that the bill gave A. sufficient information, and that the statute 6 & 7 Vict. c. 73, s. 37, was complied with. *Cosens v. Graham*, 398

#### II. Taxation of.

1. *Costs in the Cause.*—In an action by a carrier against a railway company, to recover back excessive and unequal charges made upon him for the conveyance of his goods, a verdict was entered for the plaintiff, for 10,000*l.*, subject to a special case to be settled

by a barrister, who, in the event of the court deciding in favour of the plaintiff, was by the order of reference empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were referred, subject to the special case,—the costs “of the action” to abide the event of the award, and the costs “of and incident to the reference and award” to be in the discretion of the arbitrator. The special case, as settled by the referee, divided the plaintiff’s claim into six several heads; and, the court having decided in the plaintiff’s favour upon four of them, and for the defendants on the rest of the case, the matter went back to the arbitrator, who ultimately directed that the verdict should be entered for the plaintiff for 3115*l.*, and that so much of the issue as related to that sum should be found for the plaintiff, and the residue thereof for the defendant: and he further directed that all the costs of and incident to the reference and award should be paid by the defendants:—Held, that the costs of the attendances before the referee to settle the special case, were costs in the cause; and therefore that the master was justified in apportioning them according to the decision of the court upon the several heads of claim in the special case. *Edwards v. The Great Western Railway Company*, 419

2. *Notice of Action*.—The company’s act of incorporation, 5 & 6 W. 4, c. cvii., s. 223, requiring that they should have a notice of action,—the plaintiff, at great labour and expense, prepared and delivered a notice accompanied by voluminous accounts of the several packages upon which the overcharges were alleged to have been made, together with the dates and other particulars. The master having allowed the plaintiff 100*l.* for the preparation of the notice and the accompanying accounts, and 170*l.* for one fair copy only:—The Court, on the plaintiff’s motion, refused to order a review of the taxation, on the ground that the allowance for preparing the notice was inadequate, and that two fair copies should have been allowed: and afterwards, upon the defendants’ motion, directed a review, on the ground that the 100*l.* was an excessive allowance, inasmuch as this was an expense necessarily incurred by the plaintiff in preparing himself to bring the action. *Id.*

3. *Notice to admit*.—The master also disallowed a charge of 586*l.* 17*s.* 4*d.* for a voluminous notice to admit, pursuant to the rule of Hilary Term, 2 W. 4, r. 20, setting forth descriptions of upwards of 21,000 tickets and receipts for goods carried by the company for the plaintiff and moneys paid on account thereof:—Held, that the master had exercised a sound discretion in so doing,—the notice, though apparently in strict compli-

ance with, being virtually in fraud of, the rule of court. *Edwards v. The Great Western Railway Company*, 419

### III. In Real Action.

*Formedon*.—To a count in formedon, the tenant pleaded three pleas, upon two of which issues of fact were joined, and upon the third an issue in law. All the issues, as well of law as of fact, were found for the demandant:—Held, that he was not entitled to the costs of the issues of fact, under the 4 & 5 Anne, c. 16, s. 5, that section not applying to real actions; but that he was entitled to the costs of the demurrer, under the 3 & 4 W. 4, c. 42, s. 34, the words being general, and comprehending all actions. *Cannon, Dem., Rivington, Ten.*, 514

### IV. Under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 126.

A corporation empowered by special acts, which incorporated the 8 & 9 Vict. c. 18, to construct waterworks, and to take certain lands, required lands belonging to A. and B., the boundary between which was improperly described in their plans and books of reference. In consideration of B.’s withdrawing his opposition to their bill in committee, the corporation agreed to settle the value of the land required from, and the compensation due to, A., by arbitration under the above act, and to fix the exact quantity of land, within six months after the passing of the bill. In the proceedings under the reference, the mistake of the boundary was pointed out; but the award fixed a value in terms only for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow slip of land belonging to B., but which the corporation had agreed to purchase from A. as part of his land, and for which they had paid a sum of money to A., and of which they took possession as part of the land purchased from A.

B. brought an ejectment against the corporation for this slip of land, and recovered a verdict (which the corporation unsuccessfully attempted to set aside), and issued and lodged with the sheriff a writ of habere facias possessionem.

The corporation having since the judgment in the ejectment perfected their title to the land in question, under the 124th section of the 8 & 9 Vict. c. 18,—The court stayed the proceedings upon the judgment, upon the terms of the corporation paying to the lessor of the plaintiff his “full costs and expenses” of the action, and costs of the application:—

Held, that “full costs and expenses,” in the 126th section of the 8 & 9 Vict. c. 18, meant costs “as between attorney and client.”

*Doe d. Hyde v. The Mayor, &c., of Manchester,* 474

#### V. Of Judgment by Default.

Under the Common Law Procedure Act, 15 & 16 Vict. c. 76, 506

### COUNTY COURT.

#### I. Duty and Liability of Clerk.

The county courts act, 9 & 10 Vict. c. 95, imposes no duty upon the clerk of the court to prepare or cause to be prepared notices of judgments or orders of the court for the payment of money (whether by instalments or otherwise), for service upon the defendant; nor is any such duty to be inferred from No. 114 of the rules prepared by the judges in pursuance of the 12 & 13 Vict. c. 101, s. 12,—such rules not being a judicial exposition of the statute, but mere practical directions for the guidance of the officers of the court in the performance of the duties which are imposed by the statute. *Robinson v. Gell*, 191

No action, therefore, lies against the clerk for omitting to prepare such a notice, or for negligently preparing it, whereby the defendant was misled as to the times of payment of certain instalments ordered by the judge, and had his goods taken in execution. *Id.*

#### II. Warrant of Commitment.

*Duration of.*—A defendant arrested under a warrant of commitment of a county court within three months from the day of its date, may lawfully be detained under such arrest after the expiration of the three months,—notwithstanding the 131st rule made under the authority of the 12 & 13 Vict. c. 101, s. 12, which provides that “warrants of commitment whenever issued, shall bear date on the day on which the order for commitment is made, and shall continue in force for three calendar months from such date, and no longer.” *Hayes v. Keene*, 233

#### III. Appeal.

An appeal will lie against the decision of a county court judge, under the 13 & 14 Vict. c. 61, s. 14, though the question presented to the court of appeal be a mixed question of law and fact,—provided the court can clearly see, that, in coming to the conclusion he did, the county court judge must have taken an erroneous view of the law. *Cawley, App.*, *Furnell, Resp.*, 291  
And see *CASE, I.*

### COURT OF PASSAGE.

See *JUDGE'S NOTES.*

### COVENANT.

See *DEED, I.*

### DEAD WALLS.

*Rateability of.*—See *PAVING ACTS.*

### DEED.

#### I. Construction of.

A. being seised in fee of a moiety of certain lands, and B. being seised for life of the other moiety, they, in 1805, by indenture, reciting that they were entitled thereto as tenants in common, and that they had agreed to grant a *perpetual lease* thereof to C., his heirs, &c.,—granted, demised, &c., the same to C., “his heirs, executors, administrators, and assigns, for ever;” yielding and paying therefor yearly and every year to A. and B., their heirs, &c., the clear yearly rent or sum of 120*l.*, half-yearly, &c. The deed contained all the covenants usually found in an ordinary lease:—Held, that, in the absence of proof, that, at the date of the deed, the premises were in the occupation of tenants, so that a reversion only could pass, and the expressed intention of the parties precluding the court from presuming that there had been livery of seisin,—the deed could not operate as a conveyance of the fee, subject to a *rent-charge*, but created only a tenancy from year to year. *Doe d. Robertson v. Gardiner*, 319

#### II. Custody of.

1. He who has occasion to use a deed is legally entitled to the custody of it; and where several are equally interested in it, either having possession may retain it against the others,—consequently, one cannot maintain detinue against a person in whose hands the party who first obtains possession of it has deposited it, to be redelivered to him on request. *Foster v. Crabb*, 136
2. In detinue for an indenture, the defendant pleaded that the indenture in the declaration mentioned was the grant of an annuity to the plaintiff for the life of B., secured upon certain freehold property of B., and the conveyance of that freehold by B. to S., as trustee for the plaintiff, to secure the annuity; and that, after the making of the deed, and before the plaintiff had obtained or had possession of it, and before the detention, and before the commencement of the suit, S. had obtained possession of the deed, and delivered it to the defendant, to be kept, and redelivered to S. To this plea, the plaintiff replied, that S. did not obtain, nor had he possession of, the deed before the plaintiff had obtained possession of the same *modo et forma*:—Held, that this did not amount to a negative pregnant. *Id.*
3. In detinue for a deed in which the plaintiff was interested as cestui que trust,—the defendant pleaded, that A. and B., the trustees, took and had a property and a right and title to the deed, and to the possession thereof;



that, after the making of the deed, and before the plaintiff had obtained or had possession of the same, &c., A. obtained and had possession of it; that, whilst A. was possessed of the deed, he delivered it to the defendant, to be by him kept, and to be redelivered by him to A. on request; and that the defendant detained and detains the deed from the plaintiff, for and on behalf of A., by the authority, license, and request of A.

To this plea the plaintiff replied, that, before the defendant was possessed of the deed, one G., and not the said B., was possessed thereof, and, being so possessed thereof, G. delivered the deed to the defendant, at the request and by the authority of the plaintiff, and the defendant, at the request, and by the authority, and on behalf of the plaintiff, then received the deed of and from G., and had always held and still holds the same under and by virtue of such last-mentioned request and authority,—without this that the said A. delivered the deed to the defendant, as alleged in the plea:—

Held, that the replication was sufficient both in the inducement and in the traverse; for, that, without the allegation thereby traversed, the plea would be no answer to the declaration. *Foster v. Crabb*, 379

#### DEED OF ARRANGEMENT.

See *BANKRUPT*, I.

#### DEFECT OF FENCES.

See *RAILWAY COMPANY*, III.

#### DEMISE.

Where several reversions,—See *Beer v. Beer*, 60.

#### DETINUE.

See *DEED*, II.

#### DEVIATION.

See *RAILWAY COMPANY*, I.

#### DEVISE.

*Construction of.*

*Estate Tail*.—By his will, A. devised certain freehold and personal property to trustees (whom he also named executors) for payment of debts and legacies; and, in the event of the property so devised being insufficient for that purpose, he devised all other his messuages, &c., to the same trustees, in trust to sell the same to satisfy the debts and legacies, and to divide the residue, if any, amongst all his children,—“Provided, that, in case my personal estate and my lands, &c., herein first above devised, shall be sufficient

to pay all my debts as aforesaid, then and in such case I give and devise to my son B., my dwelling-house, lands, &c., in F., for and during the term of his natural life,” remainder to his issue, and, in default of issue, to the testator's heir or heirs-at-law:—Held, that the will gave B. an estate tail in the lands in F.; and that the devise was not void for remoteness, by reason of its being postponed till after payment of debts. *Kimington v. Cannon*, 18

#### DISTRINGAS.

I. *Affidavit for.*

The court refused to grant a distringas to compel the defendant's appearance, upon an affidavit four days old. *Drinkwater v. Mills*, 452

II. *Proceeding in Lieu of.*—See *PRACTICE*, IX.

#### ECCLESIASTICAL COURT.

See *PROHIBITION*.

#### EJECTMENT.

I. *Against a Corporation.*—See *COSTS*.

II. *Judgment against the Casual Ejector.*

1. The court refused to grant a rule nisi for judgment against the casual ejector, where two terms had been allowed to elapse since the service of the declaration and notice,—although it was sworn that the delay had been caused by negotiations between the parties with a view to the settlement of the action; it not appearing that there would be any difficulty in serving the tenant again. *Doe d. Pantou v. Roe*, 267
2. Service of declaration and notice in ejectment upon the attorney of the tenant,—the premises being abandoned. *Doe d. Laundry v. Roe*, 451

#### ENCLOSURE ACT.

*Construction of.*

A local enclosure act (51 G. 3, c. cxviii.) appointed a commissioner, with power to make allotments in the usual manner, and provided, that, in case the commissioner should die, or become incapable of acting, &c., another should be appointed in his place, by a majority in value of the commoners present at a meeting to be held in the manner therein mentioned; and a subsequent section enacted that the award should be made within *six* years from the passing of the act:—Held, that an award made *nineteen* years after the passing of the act, and purporting to be made by a commissioner other than the commissioner appointed by the act, was good,—notwithstanding the lapse of time, and notwithstanding there was no proof of the due

appointment of the commissioner by whom it was made,—the statute being directory only with regard to the time of making the award. *Doe d. Roberts v. Mostyn*, 268

## ESTATE-TAIL.

See DEVISE.

## EVIDENCE.

## I. Examination of Party under a Commission.

*Semble*, that the examination of a party to the suit, under a commission, is receivable in evidence, under the 14 & 15 Vict. c. 99, s. 2. *Solomon v. Howard*, 463

## II. Questions tending to Criminate Witness.

1. A witness is not bound to answer a question, where his answer may have a tendency to render him amenable to a criminal charge: and it is no ground of complaint that the judge cautions the witness, without waiting for him to claim his privilege. *Fisher v. Ronalds*, 762
2. And, *semble*, that it is for the witness, and not for the judge, to determine whether or not the answer to the question may tend to criminate him. *Id.*

## III. Proof of Service or Delivery of Documents.

Held, that the sending of a letter of allotment and circular to the party, was sufficiently proved by the statement of the secretary of the company, that he had received instructions to send them to all the allottees, that the plaintiff was one of them, and that he believed that he had sent them to him. *Ward v. Lord Londesborough*, 252

## EXPOSURE TO SALE.

See COPYRIGHT.

## EXTORTION.

See SHERIFF.

## FALSE IMPRISONMENT.

See CASE, II.

## FEES.

To be taken at the offices of the superior courts, and at the judges' chambers as settled by the judges, 615

## FELON CONVICT.

*Assignment of Goods of.*

An assignment of a felon's goods, *bonâ fide* made, for a good consideration, after the commission day of the assizes, but before the day upon which he was actually tried and convicted, will pass the property. *Whitaker v. Wisbey*, 44

## FENCES.

*Repair of*,—See RAILWAY COMPANY, III.

## FERRY.

*Liability of Lessees or Owners for Negligence.*

The lessees of a ferry provided steamboats for the conveyance of passengers, goods, and cattle from A. to B., and also slips for landing and embarking, which were (generally) sufficient for the purpose:—Held, that they were liable for an injury sustained by the horse of a passenger, in consequence of the side-rail of the landing-slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control and management of its owner. *Willoughby, App., Horridge, Resp.*, 742

## FINAL ORDER.

See INSOLVENT DEBTOR.

## FIXTURES.

See LANDLORD AND TENANT, I.

## FORMEDON.

## I. Limitation in.

1. An estate-tail having been discontinued by a feoffment made by the tenant-in-tail more than twenty years before his death,—Held, that the issue in tail might bring his writ of formedon at any time within twenty years next after such death,—the period of limitation prescribed by the statute 3 & 4 W. 4, c. 27, not running against him during the life of the tenant-in-tail. *Cannon, Dem., Rimington, Ten.*,
2. A count in formedon in the descender stated, that A., being seised of lands, on the 30th of November, 1796, devised the same to B. and the heirs of his body; that A. died seised, without revoking his will, leaving B. surviving; and that B. died within twenty years next before the commencement of the suit, leaving C., the demandant, his son and heir, surviving. The defendant pleaded,—that the right, title, and cause of action in the writ and count mentioned, did not first descend or accrue within twenty years next before the suing out the writ,—and that, after B. was seised, and twenty years and more before the commencement of the action, viz., on the 31st of January, 1798, B. discontinued the possession of the tenements aforesaid, and the receipt of the profits thereof, and that, from that time, neither B. nor the demandant was in possession of the said tenements, or the receipt of the profits thereof. To the last plea the demandant replied, that B., whilst seised of the tenements, and before the discontinuance of the possession thereof,

or the receipt of the rents and profits, viz., on the 31st of January, 1798, enfeoffed one D. (the father of the defendant) of the said tenements, to hold in fee, and that thereby the estate so devised to B. was discontinued until the death of B., and until the 1st of June, 1835, and until the commencement of the suit, and that B. died within twenty years before the commencement of the suit, and before the 31st of December, 1833, viz., on the 29th of April, 1831; and, further, that, on the 1st of June, 1835, the demandant was entitled to maintain an action of formedon in the descender in respect of the said tenements, and so remained until the suing out of the writ; and that B. never at any time after the enfeoffment was seised or possessed of or entitled to the tenements, or to receive, and never did receive, the rents and profits thereof:—Held,—affirming the judgment of the Court of Common Pleas on a demurrer to the replication to the last plea,—that the issue in tail of B. was entitled to bring his formedon within twenty years after B.'s death; the discontinuance of possession in the 3d section of the 3 & 4 W. 4, c. 27, being, the ceasing to possess when the party so ceasing *had a right to possess*, which B. could not have, after he had conveyed his estate to the feoffee. *Rimington v. Cannon*, 18

3. By his will, A. devised certain freehold and personal property to trustees (whom he also named executors) for payment of debts and legacies; and, in the event of the property so devised being insufficient for that purpose, he devised all other his messuages, &c., to the same trustees, in trust to sell the same to satisfy the debts and legacies, and to divide the residue, if any, amongst all his children,—"Provided, that, in case my personal estate and my lands, &c., herein first above devised, shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son B., my dwelling-house, lands, &c., in F., for and during the term of his natural life," remainder to his issue, and, in default of issue, to the testator's heir or heirs at law:—Held, that the will gave B. an estate-tail in the lands in F.; and that the devise was not void for remoteness, by reason of its being postponed till after payment of debts; but that, inasmuch as the estate was given to B., not absolutely, but only in the event of the estate first devised to the trustees proving sufficient for the payment of debts, the allegation in the count, which imported an absolute devise to B., was not proved. *Id.*

#### II. Costs in.

To a count in formedon, the tenant pleaded three pleas, upon two of which issues of fact were joined, and upon the third an issue in law. All the issues, as well of law

as of fact, were found for the demandant:—Held, that he was not entitled to the costs of the issues of fact, under the 4 & 5 Anne, c. 16, s. 5, that section not applying to real actions; but that he was entitled to the costs of the demurrer, under the 3 & 4 W. 4, c. 42, s. 34, the words being general, and comprehending all actions. *Cannon, Dem., Rimington, Ten.*, 514

#### FOREIGN CONTRACT.

An action will not lie in the courts of this country, to enforce an oral agreement made in France, and valid there, which, if made here, could not, by reason of the statute of frauds, have been sued upon. *Leroux v. Brown*, 801

#### FRAUDS.

*Statute of*,—See STATUTE OF FRAUDS.

#### FRAUDULENT CONVEYANCE.

See BANKRUPT, I.

#### FREIGHT.

*Payment of*,—See SHIP AND SHIPPING.

#### FULL COSTS.

See COSTS, IV.

#### FURIOUS DRIVING.

See CASE, II.

#### GAMING.

*Bet on a Horse-Race.*

1. A. and B. jointly made bets with third persons on a horse-race. B. received the money, and gave A. a bill accepted by C. (who was no party to the betting) for his share:—Held, that A. was not precluded by the 8 & 9 Vict. c. 109, s. 18, from suing C. upon the bill. *Johnson v. Lansley*, 468
2. *Semble*, that that statute does not render betting on a horse-race illegal. *Id.*

#### HABEAS CORPUS.

*Service and Return of.*

1. The court will receive the return of habeas corpus, although the party called upon to make it is not present. *In re Thomas Hawkswill*, 223
2. Service of the writ, by leaving it with "the brother and agent" of the party called upon, at his place of abode,—Held, sufficient. *Id.*

#### HARBOUR COMMISSIONERS.

See CASE, I. 2.

#### HORSE-RACE.

See GAMING.

## HUSBAND AND WIFE.

*Conveyance by Married Woman.*

An affidavit to found a motion under the 3 & 4 W. 4, c. 74, s. 91, must describe the deponent as the "wife of," &c., even though it disclose circumstances showing a well-grounded belief that the husband is dead. *Ex parte Lydia Sparrow*, 334

## INDENTURE.

*See DEED.*

## INFANT.

*Plea of Infancy, in Action on a Bill of Exchange, Proof of.*

Assumpsit by endorsee against acceptor on six bills of exchange, five of which became due on or before the 5th of February, and one on the 12th of March, 1851. Plea, that the defendant was an infant at the time of accepting the bills. Issue being joined upon the replication to this plea, it was proved, that the drawer, the acceptor, and the endorsee, all resided in London, and that the defendant attained his majority on the 11th of March, 1851:—Held, that, upon this evidence, the jury were warranted in finding that the bills were accepted by the defendant whilst he was an infant,—a bill of exchange, in the absence of proof to the contrary, being presumably accepted within a reasonable time after its date, and before its maturity. *Roberts v. Bethell*, 778

## INSOLVENT DEBTOR.

*Final Order.*

*Tort.*—A final order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 98, is no protection against an execution on a judgment in an action of tort signed after, upon a verdict obtained before, the making of such final order. *Beavan v. Walker*, 480

## INTEREST IN LAND.

*See STATUTE OF FRAUDS, II.*

## INTERPLEADER.

*By Railway Company.*

An action having been brought by A. against a railway company, to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A.,—Held, that the company were not entitled to relief under the interpleader act, 1 & 2 Vict. c. 58, s. 1. *Dalton v. The Midland Railway Company*, 458

## IRREGULARITY

*See PRACTICE, II.*

## JOINT-STOCK BANK.

*Security given to Trustees of.*

Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the copartnership, the judgment thereon is properly entered up in the name of the public officer for the time being. *Bell v. Fisk*, 493

## JOINT-STOCK COMPANY.

*Contract on behalf of, within 7 & 8 Vict. c. 110, s. 44.*

A contract entered into "on behalf of" a joint-stock company, within the 7 & 8 Vict. c. 110, s. 44, means, a contract by which the company contracts to do something: and that section does not prevent the company from enforcing against third parties a contract which is unilateral only, and which (though they are expressed to be parties to it) has not been executed by the company. *The British Empire Mutual Life-Assurance Company v. Browne*, 723

## JUDGE'S NOTES.

*Affidavit of Verification of.*

A rule to show cause why a verdict for the defendant, or a nonsuit, should not be entered, in a cause which had been sent for trial before the assessor of the Passage Court at Liverpool, under the 3 & 4 W. 4, c. 42, s. 17, was drawn up "on reading the writ of trial, the assessor's notes, and the affidavit verifying the same." In this affidavit, the deponent described himself as "Thomas Henry Sanger, clerk to Edward James, Esq., barrister at law, and assessor of the Court of Passage of the borough of Liverpool," without giving his place of residence:—Held, that the affidavit was insufficient; and that, without an affidavit verifying the notes, there were no materials upon which the court could entertain the motion. *Winck v. Williams*, 416

## JUDGE'S ORDER.

*See PAYMENT.*

## JUDGMENT.

I. *Entering Judgment Nunc pro Tunc.*—*See PRACTICE VIII.*

II. *Notice of.*—*See COUNTY COURT.*

III. *On Warrant of Attorney.*—*See WARRANT OF ATTORNEY, II.*

IV. *As in Case of a Nonsuit.*—*See PRACTICE, VII.*

## LANDLORD AND TENANT.

*I. Tenant's Right to remove Fixtures.*

1. An ejectment was brought for the recovery

of certain premises, on the 8th of February : on the 19th, the defendants allowed judgment to go by default, upon the lessor of the plaintiff entering into the following agreement :—"In consideration of Messrs. J. & G. B. (the tenants) not appearing to this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next."—Held, that the defendants were by this agreement precluded from removing fixtures put up by them on the premises, in the interval between the 19th of February and the 25th of March,—the fair construction of the agreement being, that the premises should be given up in the same state they were in on the day judgment was signed. *Heap v. Barton*, 274

2. *Quare*, as to the right of a tenant to remove fixtures after the expiration of his term, where he still continues in actual possession of the premises, whether by wrong, or with the landlord's consent. *Id.*

II. *Tenancy from year to year*.—See DEED.

#### LANDS CLAUSES CONSOLIDATION ACT.

See COSTS.

#### LAWFUL GAMES.

See GAMING.

#### LEASE.

See DEED.

#### LETTERS-PATENT.

##### I. *Construction of Specification.*

A specification of an invention of "an improved turning-table for railway purposes," described the alleged invention "to consist in supporting the revolving plate or upper platform of the turning-table, as also its stays, braces, arms, and supports, on the top of a fixed post, well braced, and resting on or planted in the ground, the top of which post forms a pivot for the table to turn on, while support-arms radiating from a frame-work (the weight of which is also sustained on the post) moving round the bottom part of the post, with friction-rollers, and fastened to the outer edges of the plate, stay the plate at all sides, and keep it steady to receive the superincumbent weight of carriages or whatsoever is to be turned upon it." And, after describing the drawings, the specification concluded thus :—"Now, whereas I claim as my invention the improved turning-table hereinbefore described, and such my invention being to the best of my knowledge and belief entirely new, and never before used in England, &c., I do declare this to be my specification of the same, and that I do verily believe this my specification doth comply in all respects, fully and without

reserve or disguise, with the proviso in the hereinbefore in part recited letters-patent contained; wherefore I do hereby claim to maintain exclusive right and privilege to my said invention :"—

Held, that the specification claimed the whole combination as new; and,—a jury having found that the only novelty consisted of the *suspending-rods* (all the rest having been substantially, described in the specification of a patent previously granted to another person),—that the defendant, in an action for an alleged infringement, was entitled to a verdict on a plea taking issue on the sufficiency of the specification. *Holmes v. The London and North-Western Railway Company*, 831

##### II. *Evidence of Infringement.*

The plaintiff obtained letters-patent for "improvements in the manufacture of iron and steel." In his specification, he declared his invention to be (amongst other things), "the use of carburet of manganese in any process whereby iron is converted into cast-steel;" and he described the process which he claimed, thus :—"I do it, by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of "carburet of manganese, in any process for converting iron into cast-steel."

The defendant produced the same result,—a superior and more valuable description and quality of cast-steel,—as certainly, and more cheaply, by substituting for the carburet of manganese, *oxide of manganese and coal-tar*, which, being put into the crucible with the iron, according to the evidence of chemists, would form "carburet of manganese" before the iron was in a state of fusion, and consequently before any combination therewith could take place :—

Held, upon a bill of exceptions,—by Wightman, J., Erle, J., Platt, B., and Crompton, J. (dissentientibus Alderson, B., and Coleridge, J.),—that the judge was wrong in telling the jury that there was no evidence of infringement. *Heath v. Unwin*, 522

#### LEX LOCI CONTRACTUS.

See STATUTE OF FRAUDS, I.

#### LIEN.

For Freight.—See CHARTER-PARTY.

## LIMITATION OF ACTION.

I. *Currency of Statute of Limitations.*

A promissory note was given by the defendant to the plaintiffs in 1840, payable, five years after date, for value received:—Held, that it was evidence of an account stated, against which the statute of limitations did not commence running until the maturity of the note.

*Fryer v. Roe,* 437

A writ of summons issued under the uniformity of process act, expired before the 24th of October, 1852, when the common law procedure act, 15 & 16 Vict. c. 76, came into operation:—Held, that an alias to save the statute of limitations, must issue pursuant to the former act. *Gapp v. Robinson,* 828

II. *Promise to take a Case out of the Statute.*

The following letter addressed by the defendant to the plaintiff, within six years, respecting a debt otherwise barred by the statute of limitations, was held (on appeal) not a sufficient acknowledgment of the debt to take the case out of the statute:—"I am much surprised at receiving a letter from H. (the plaintiff's attorney) this morning, for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechneion, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. (one of the plaintiffs) was in town." *Cawley, App., Furnell, Resp.,* 291

III. *In Real Action.*

*See FORMEDON.*

## LOCAL PAVING ACTS.

*See FOREIGN LAW.*

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*Loss of,—See RAILWAY COMPANY, II.*

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*See PAVING ACTS.*

## MONEY HAD AND RECEIVED.

*Where maintainable.*

The plaintiff received a letter of allotment, allotting him 100 shares in a projected railway, upon which he paid a deposit of 2l. 2s. per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the following provision:—"In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." There was no evidence of any application by the plaintiff for shares, or that his allotted shares had been exchanged for scrip; and it appeared that he had never signed the parliamentary contract or subscribers' agreement. The project proving abortive,—Held, that money had and received lay, to recover back the deposit paid. *Ward v. Lord Londesborough,* 252  
*And see VICARS CHORAL, 2.*

## MUNICIPAL CORPORATION.

*Assessor of Borough Court.*

The 92d section of the municipal reform act, 5 & 6 W. 4, c. 76, enacts, that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, &c., of all moneys, dues, chattels, and securities belonging to the corporation, shall be paid to the treasurer, and shall be carried by him to the account of a fund called "The Borough Fund," and such fund shall (subject to certain charges thereon) be applied towards the payment of the salaries of the mayor, recorder, &c., and of any other officer whom the council shall appoint:—Held, that the judge and assessor of the borough court of record for the trial of civil actions, appointed by the council at a certain salary, could not maintain an action of debt against the corporation, for arrears of such salary. *Addison v. The Mayor, &c., of Preston,* 108

## MUSIC.

*Infringement of Copyright in,—See COPYRIGHT.*

## NEGLIGENCE.

*See CASE, I.*  
*COUNTY COURT.*

## NEVER INDEBTED.

*See PLEADING, IV.*

## NONSUIT.

*Judgment as in Case of,—See PRACTICE, VII.*

## NOTICE.

I. *Notice of Action*,—See COSTS.

II. *Notice to Admit*,—See COSTS.

III. *Term's Notice of Proceeding*,—See PRACTICE, V.

IV. *Notice of Order of County Court*,—See COUNTY COURT.

## NUNC PRO TUNC.

See PRACTICE, VIII.

## ORDER.

*Notice of*,—See COUNTY COURT.

## PARENT AND CHILD.

*Custody of Infant Children.*

The father is by law entitled to the custody of his legitimate children: and, *semble* that a court of common law has no jurisdiction, under any circumstances, to deprive him of that right. In re *Thomas Hakewill*, 223

## PASSAGE COURT.

See JUDGE'S NOTES.

## PASSENGER'S LUGGAGE.

See RAILWAY COMPANY, II.

## PATENT.

See LETTERS-PATENT.

## PAVING-ACTS.

*Construction of.*

By a local paving act, 41 G. 3, c. cxxxi. s. 37, the commissioners were to rate all "houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings, and tenements:" and s. 40 provided that the rates "upon or in respect of any chapel, meeting-house, hospital, school, or other public building, or any wall, garden, yard, or void space of ground, should be ascertained according to the number of square yards of pavement paved, &c., under the act belonging to such chapel, &c., measuring the same from such chapel, &c., to the middle of the street, &c., on which the same should respectively abut, &c.; but so, nevertheless, as that no rate or assessment should by virtue of that act be laid upon, or collected or received for or in respect of, any wall, garden, yard, or void space of ground, unless the space should abut upon or front some street, &c., to be paved."

The 26th section of the 43 G. 3, c. cxxxix., which was substituted for the 37th section of the former act, provided that the rates should be assessed "upon all and every person and persons who should inhabit, hold, occupy, &c., any house, &c., building, or

tenement, in any of the said streets, &c., according to the yearly rent or value of such houses," &c.

And by the 30th section of the general metropolitan paving act, 57 G. 3, c. xxix., the commissioners are to assess "any cathedral, collegiate, or other church or churches, parochial or other chapels, meeting-houses, places for religious worship, hospitals, public schools, and all other public buildings," &c., at a given rate for every square yard of the foot, carriageway, and other pavements contained in one-half of the entire width of the street, &c., as shall lay before or at the sides or rear of, or abut upon or adjoin to, such cathedral, collegiate, or other church or churches, &c., or before, upon, or to the areas or ground in front of, or surrounding, or belonging to the same, &c.; and also to rate and assess "all and every the churchyards, cemeteries, or other burying places, dead walls, and void spaces of ground, within such parochial or other district, and which are not charged to such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant, at a rate not exceeding 1s. for every square yard of the foot and carriageway and other pavements contained in one-half of the entire width of as much of any and every such street or public place as shall or may lay before or at the sides or rear of, or abut upon or adjoin to, such churchyards, cemeteries, or other burying places, dead walls, and void spaces of ground," &c.

The London and Birmingham Railway Company, by one of their acts (5 & 6 W. 4, c. lvi., s. 55), were required to build, and for ever thereafter keep in repair, a bridge over their railway, with a brick wall at each side thereof, at a spot where their railway intersected a public street or road which was paved and repaired under the local acts. The land upon which that part of the railway was constructed, and the bridge erected, was conveyed to the company in fee by the former owner, with a reservation of "the use and enjoyment of the bridge." The surface of the bridge was paved by the local commissioners:—

Held, that the company were liable to be assessed under the above acts; for, that, although the bridge was not a "public building," within the meaning of the 57 G. 3, c. xxix., s. 30, the company were rateable in respect of the *side walls*, under the description of "dead walls," or,—per Jervis, C. J.,—as the owners and occupiers of "void spaces of ground" abutting on the road.

And, *semble*, per Maule, J., and Talfourd, J., that the *fence-walls* came within the description of "public buildings" in the 57 G. 3, c. xxix., s. 30, being erected under the provisions of an act of parliament, and for

the benefit of the public. *Arnell v. The London and North-Western Railway Company*, 697

## PAYMENT.

*Under Judge's Order.*

Two actions having been brought upon a bill of exchange,—the one against the drawer, the other against the acceptor,—the defendant in the first action obtained a judge's order for a stay of proceedings on payment of debt, interest, and costs:—Held, that the payment under that order could not be pleaded, in bar of the further maintenance of the second action, as a payment in satisfaction and discharge of the causes of action against the acceptor, or relied on as a ground for reduction of damages. *Randall v. Moon*, 261  
And see PLEADING, II. 3.

## PLEADING.

## I. ACCOUNT.

*Pleadings in*.—See ACCOUNT.

## II. ASSUMPSIT.

1. *Plea of amounting to Non-Assumpsit*.]—See ACCORD AND SATISFACTION.
2. *Want of Consideration*.]—A plea of want of consideration, in an action on a bill of exchange, must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned. *Boden v. Wright*, 445
3. *Payment*.]—Two actions having been brought upon a bill of exchange,—the one against the drawer, the other against the acceptor,—the defendant in the first action obtained a judge's order for a stay of proceedings on payment of debt, interest, and costs:—Held, that the payment made under that order could not be pleaded, in bar of the further maintenance of the second action, as a payment in satisfaction and discharge of the causes of action against the acceptor, or relied on as a ground for reduction of damages. *Randall v. Moon*, 261
4. *Infancy*.]—See INFANT.
5. *Collateral Agreement between Plaintiff and a Third Person*.]—See ACCORD AND SATISFACTION.
6. *Averment of Readiness and Willingness*.]—See CONTRACT.

## III. CASE.

*Against Sheriff for Extortion*.]—In an action against a sheriff and a bailiff for extortion on the execution of a *fi. fa.* at the suit of the plaintiff, under the 28 (commonly called 29) Eliz. c. 4, the declaration,—after stating the delivery of the writ to the sheriff to be executed,—alleged that the defendants, as sheriff and bailiff, respectively, wrongfully, &c., received and took from the plaintiff, for serving and executing the writ, more and other con-

sideration and recompense than by the statute in such case made,—that is to say, by the statute passed in the twenty-ninth year of the reign of Elizabeth, intituled, &c.,—is limited and appointed, that is to say, the defendants then received and took from the now plaintiff, to wit, 8*l.*, for serving and executing the said execution, although they did not levy any sum of money whatever by virtue or force of the said execution, and were entitled to no consideration or recompense whatever for serving or executing the said execution; whereby the plaintiff was aggrieved, &c., “contrary to the form of the statute in such case made and provided,” &c.:—Held, that the declaration sufficiently disclosed a cause of action upon the statute; and that the misrecital of it was immaterial, and might be rejected. *Holmes v. Sparkes*, 242

## IV. DEBT.

*Nunquam Indebitatus*.]—On a settlement of accounts between the plaintiff and defendant, the plaintiff was found to have been overpaid by 1*l.* 1*l.* 5*d.*, which sum (as the jury found) it was agreed should go to the defendant's credit in their future dealings. This claim, however, was barred by the statute of limitations. The plaintiff afterwards did work for the defendant to the amount of 5*l.* 6*s.* 6*d.*, and brought an action to recover that sum. The defendant paid 4*l.* into court:—Held, that he had a good answer to the balance of 1*l.* 6*s.* 6*d.* under never indebted. *Smith v. Winter*, 487

## V. DETINUE.

*Special Traverse*.]—In detinue for a deed in which the plaintiff was interested as cestuique trust,—the defendant pleaded, that A. and B., the trustees, took and had a property and a right and title to the deed, and to the possession thereof; that, after the making of the deed, and before the plaintiff had obtained or had possession of the same, &c., A. obtained and had possession of it; that, whilst A. was possessed of the deed, he delivered it to the defendant, to be by him kept, and to be redelivered by him to A. on request; and that the defendant detained and detains the deed from the plaintiff, for and on behalf of A., by the authority, license, and request of A.

To this plea the plaintiff replied, that, before the defendant was possessed of the deed, one G., and not the said B., was possessed thereof, and, being so possessed thereof, G. delivered the deed to the defendant, at the request and by the authority of the plaintiff, and the defendant, at the request, and by the authority, and on behalf of the plaintiff, then received the deed of and from G., and had always held and still holds the same under and by virtue of such last-mentioned request and authority,—without this that the



said A. delivered the deed to the defendant, as alleged in the plea:—Held, that the replication was sufficient both in the inducement and in the traverse; for, that, without the allegation thereby traversed, the plea would be no answer to the declaration. *Foster v. Crabb*, 379

#### VI. FORMEDON.

A count in formedon in the descender stated, that A., being seized of lands, on the 30th of November, 1796, devised the same to B. and the heirs of his body; that A. died seized, without revoking his will, leaving B. surviving; and that B. died within twenty years next before the commencement of the suit, leaving C., the demandant, his son and heir, surviving.

By his will, A. devised certain freehold and personal property to trustees (whom he also named executors) for payment of debts and legacies; and, in the event of the property so devised being insufficient for that purpose, he devised all other his messuages, &c., to the same trustees, in trust to sell the same to satisfy the debts and legacies, and to divide the residue, if any, amongst all his children,—"Provided, that, in case my personal estate and my lands, &c., herein first above devised, shall be sufficient to pay all my debts as aforesaid, then and in such case I give and devise to my son B., my dwelling-house, lands, &c., in F., for and during the term of his natural life," remainder to his issue, and, in default of issue, to the testator's heir or heirs at law:—Held, that the will gave B. an estate-tail in the lands in F.; and that the devise was not void for remoteness, by reason of its being postponed till after payment of debts; but that, inasmuch as the estate was given to B., not absolutely, but only in the event of the estate first devised to the trustees proving sufficient for the payment of debts, the allegation in the count, which imported an absolute devise to B., was not proved. *Rimington v. Cannon*, 18

#### POLICE ACT.

See CASE, II.

#### POSTPONEMENT.

Of Trial,—See PRACTICE, VI.

#### PRACTICE.

##### I. Process.

*Distingas*.]—The court refused to grant a *distingas* to compel the defendant's appearance, upon an affidavit four days old. *Drinkwater v. Mills*, 452

##### II. Instituting Affidavit.

The defendant was described in the writ as "H. W. Bauerman," and entered an appear-

ance as "Henry William Bauerman:" upon a collateral motion, his affidavit was intituled "*Hillary John Bauerman* (his true name), sued as Henry William Bauerman:"—Held, irregular. *Baldwin v. Bauerman*, 152

#### III. Notice of Action.

See COSTS, II. 3.

#### IV. Notice to Inspect and Admit.

See COSTS, II. 2.

#### V. Term's Notice of Proceeding.

1. Upon a motion to set aside a step in a cause, on the ground that a term's notice of proceeding was necessary,—the affidavit must distinctly allege that a term's notice has not been given: it is not enough to state "that no step or proceeding in the cause" has been taken. *Minchiner v. Martin*, 455
2. *Quare*, whether a term's notice is necessary, where the plaintiff's proceedings have been suspended by an order for security for costs? *Id.*
3. *Semble*, that no notice would be necessary in such a case, if security were given. *Id.*

#### VI. Postponing Trial.

*Absence of Defendant*.]—The defendant, a master-mariner, having gone abroad, in the course of his business, after the commencement of the action, and after time obtained to plead, but before issue joined,—the court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence. *Solomon v. Howard*, 463

#### VII. Judgment as in Case of a Nonsuit.

Upon a motion for judgment as in case of a nonsuit, it is enough if the affidavit shows a default, without going on to negative that the plaintiff has since proceeded to trial: that fact should come from the other side. *Blackman v. Asplin*, 453

#### VIII. Judgment Nunc pro Tunc.

1. It is only where delay in signing judgment has arisen from the act of the court, that judgment can be entered *nunc pro tunc*, two terms having elapsed since the verdict. *Freeman v. Tranah*, 406
2. A cause in which a verdict was entered for the plaintiff, was referred at the Spring Assizes, 1851: the arbitrator made his award, directing a verdict to be entered for the plaintiff, in Trinity Term following: the plaintiff died on the 22d of November: on the 3d of December, her will was taken to the proper office, to be proved, in order to enable her executrix to sign judgment; but, in consequence of a caveat having been entered by the defendant, probate was not obtained until the 6th of May, 1852. In Trinity Term, 1852, the executrix moved for leave to enter up

judgment as of Michaelmas Term, 1851:—Held, that, inasmuch as the delay was not attributable to any act of the court, the court had no authority to grant the application. *Freeman v. Tranah*, 406

**IX. Under the Common Law Procedure Act, 15 & 16 Vict. c. 76.**

*Sections 10, 12.*—*Gapp v. Robinson*, 828.

*Section 17.*—An order that the plaintiff be at liberty to proceed upon a quasi service of the writ of summons, under the 15 & 16 Vict. c. 76, s. 17, which is given in lieu of the old proceeding by distringas to compel appearance,—is absolute in the first instance. *Barringer v. Handley*, 720

**PRINTING.**

See COPYRIGHT.

**PROHIBITION.**

*To the Ecclesiastical Court.*

1. Prohibition to the spiritual court lies only where that court is proceeding in a matter which is clearly out of its jurisdiction, or in a manner that is manifestly contrary to the general principles of justice. *Ex parte Story*, 767
2. A. was cited to appear, and did appear, in the Consistorial Court, in a suit promoted against him by his wife, for restitution of conjugal rights. In the course of that suit, two orders were made, decreeing restitution, and alimony pendente lite,—for disobedience of which A. was about to be pronounced in contempt:—Held, that, inasmuch as A. had once appeared, this court could not pronounce the giving of judgment against him in his absence, and without previous notice thereof to him, a proceeding without jurisdiction, or contrary to justice. *Id.*

**PROCEEDING.**

*Term's Notice of.*—See PRACTICE, V.

**PROCESS.**

See PRACTICE, I.

**PROMOTIONS.**

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**PUBLIC BUILDINGS.**

*Rateability of.*—See PAVING ACTS.

**PUBLICATION.**

See COPYRIGHT.

**RAILWAY BRIDGE.**

*Rateability of.*—See PAVING ACTS.

**RAILWAY COMPANY.**

*I. Power of Deviation.*

*Tunnel.*—By the 13th section of the railway

clauses consolidation act, 8 & 9 Vict. c. 20, it is enacted, that, when a tunnel is marked on the plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, or occupiers of the land on which such tunnel is intended to be made, shall consent that the same shall not be made. By s. 14, it is enacted that no tunnel shall be altered or deviated, except that it may be lawful for the company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by a certificate from the board of trade. And, by s. 15, it is enacted that it shall be lawful for the company to deviate within certain limits. Held, that the company are bound to make a tunnel at the spot marked, and cannot deviate therefrom, without consent, or unless authorized so to do by their special act. But that, where they have deviated their line at a spot where a tunnel is marked, they are not bound to make a tunnel in the deviated line. *Little v. The Newport, Abergavenny, and Hereford Railway Company*, 752

**II. Liability for Loss of Passenger's Luggage.**

A railway company is responsible for the loss of a passenger's luggage (within the weight allowed), which has been delivered to one of its servants, though not booked and paid for; notwithstanding a by-law which provides that "every first-class passenger will be allowed 112 lbs., and every second-class passenger 56 lbs. of luggage, free of charge; but the company will not be responsible for the care of the same, unless booked and paid for accordingly,"—in the absence of evidence that the company has provided means for the booking of luggage. *The Great Western Railway Company, App., Goodman, Resp.* 313

**III. Duty of, to make and repair Fences.**

1. The duty imposed upon railway companies by the railways clauses consolidation act, 1845, 8 & 9 Vict. c. 20, s. 68, as to the making and repairing of fences between their railways and the adjoining lands, is not more extensive than that imposed upon ordinary tenants by the common law. *Ricketts v. The East and West India Docks and Birmingham Junction Railway Company*, 160
2. Therefore, where the plaintiff's sheep escaped from his close, through his own defect of fences, and, getting into the intervening close of a third party, escaped thence on to the defendants' railway, and were killed:—Held, that the company were not liable. *Id.*

**IV. Extortionate Charges for Carriage of Goods,**

See COSTS, II.

V. *Interpleader by, in Action for Dividends.*

An action having been brought by A. against a railway company, to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A.,—Held, that the company were not entitled to relief under the interpleader act, 1 & 2 Vict. c. 58, s. 1. *Dalton v. The Midland Railway Company*, 458

VI. *Liability of Directors.*

The plaintiff received a letter of allotment, allotting him 100 shares in a projected railway, upon which he paid a deposit of 2*l.* 2*s.* per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the following provision:—"in the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." There was no evidence of any application by the plaintiff for shares, or that his allotted shares had been exchanged for scrip; and it appeared that he had never signed the parliamentary contract or subscribers' agreement. The project proving abortive,—Held, first, that money had and received lay, to recover back the deposit paid: Secondly, that the letter of allotment and circular were admissible in evidence without being stamped, inasmuch as they did not constitute the whole agreement between the directors and the allottees: Thirdly, that the sending of the letter of allotment and circular to the plaintiff, was sufficiently proved by the statement of the secretary of the company, that he had received instructions to send them to all the allottees, that the plaintiff was one of them, and that he believed he had sent them to him. *Ward v. Lord Londesborough*, 252

## READINESS AND WILLINGNESS.

*See CONTRACT, I.*

## RENT-CHARGE.

*See DEED, I.*

## ST. PAUL'S.

*See VICARS CHORAL.*

## SALE.

*See COPYRIGHT.*

## SHARES.

*See RAILWAY COMPANY, VI.*

## SHERIFF.

*Case against, for Extortion.*

In an action against a sheriff and bailiff for extortion on the execution of a *f. fa.* at the suit of the plaintiff, under the 28 (commonly called 29) Eliz. c. 4, the declaration,—after stating the delivery of the writ to the sheriff to be executed,—alleged that the defendants, as sheriff and bailiff, respectively, wrongfully, &c., received and took from the plaintiff, for serving and executing the writ, more and other consideration and recompense than by the statute in such case made,—*that is to say*, by the statute passed in the twenty-ninth year of the reign of Elizabeth, intituled, &c.,—is limited and appointed, that is to say, the defendants then received and took from the now plaintiff, to wit, 8*l.* for serving and executing the said execution, although they did not levy any sum of money whatever by virtue or force of the said execution, and were entitled to no consideration or recompense whatever for serving or executing the said execution; whereby the plaintiff was aggrieved, &c., "contrary to the form of the statute in such case made and provided," &c.:—Held, that the declaration sufficiently disclosed a cause of action upon the statute; and that the misrecital of it was immaterial, and might be rejected. *Holmes v. Sparkes*, 242

## SHIP AND SHIPPING.

I. *Owner's Lien for Freight*,—*See CHARTER-PARTY.*II. *Payment of Freight by Brokers.*

A ship-broker having received freight under a charter-party on account of the owners, went over the accounts of his disbursements on behalf of the ship, with the captain (who was also the managing owner), and offered him a check for the balance. The captain declined to take it, but told the broker he wanted to get 250*l.* remitted to a person residing in New Brunswick; whereupon the broker went with him and opened a credit for that sum with the British North American Bank at New Brunswick, whence a bill was drawn upon the broker at sixty days' sight, which was afterwards duly honoured:—Held, that this was a good payment, as between the broker and the captain's co-owners. *Anderson v. Hillies*, 499

## SPECIAL CASE.

*See COSTS, II.*

## SPECIAL TRAVERSE.

*See PLEADING, V.*

## SPECIAL VERDICT.

*Form of.*

A special verdict must find the facts, and not consist of a mere statement of evidence.  
*Fryer v. Roe,* 437

## SPECIFICATION.

*See LETTERS-PATENT, I.*

## STAMP.

*I. On Agreement.*

On the 17th of March, 1838, an agreement was executed in counterpart, each part being duly stamped with a 35s. stamp, between the plaintiffs and the defendants. Two or three weeks afterwards, a memorandum was endorsed upon each part of the agreement, for the purpose of more accurately defining the intention of the parties,—the memorandum endorsed on the part of the agreement which was in the defendants' possession being signed by the plaintiffs' attorney, and being stamped with a 35s. stamp,—that endorsed on the part of the agreement in the plaintiffs' possession being signed by the defendants' attorney, and stamped with a 20s. stamp.

At the trial the plaintiffs called for and read the agreement which was in the hands of the defendants, with the memorandum endorsed thereon. They then produced their part of the agreement, and (after proving the authority of the attorney who had executed it) read the memorandum endorsed on it; and then they proposed to read the agreement, which the memorandum referred to as "the within-mentioned agreement." It was thereupon objected, on the part of the defendants, that, inasmuch as the agreement was thus incorporated in the memorandum, and both together contained more than fifteen folios, a 35s. stamp upon the memorandum was necessary,—in the absence of proof of the agreement it referred to, by calling the attesting witnesses: and the judge ruled that it was inadmissible.

Held, upon exceptions to that ruling, that the last-mentioned memorandum was sufficiently stamped, and the agreement it referred to admissible in evidence without calling the attesting witnesses. *The Fishmongers' Company v. Dimesdale,* 557

*II. Letter of Allotment.*

The plaintiff received a letter of allotment, allotting him 100 shares in a projected railway, upon which he paid a deposit of 2l. 2s. per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the fol-

lowing provision:—"In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction:"—Held, that the letter of allotment and circular were admissible in evidence without being stamped, inasmuch as they did not constitute the whole agreement between the directors and allottees. *Ward v. Lord Lonsborough,* 252

## STATUTE.

*Miscital of,—See SHERIFF.*

## STATUTE OF FRAUDS.

*I. Contract made Abroad.*

An action will not lie in the courts of this country, to enforce an oral agreement made in France, and valid there, which, if made here, could not, by reason of the statute of frauds, have been sued upon. *Leroux v. Brown,* 801

*II. Interest in Land.*

In consideration that A., who was tenant of a messuage and premises under a parol agreement for a seven years' lease, would give up the immediate possession thereof to B., in order that B. might enter thereon as tenant, and also as a compensation for certain improvements made by A. on the premises, and for the value of certain articles left thereon by A.,—B. agreed to pay A. 100l. A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.; and B. afterwards, in part performance of the agreement on his part, paid A. 51l. In an action brought by A., in the county court, to recover the balance of the 100l.,—the judge ruled that the contract in respect of which the plaintiff sued was not a contract for the sale of an interest in or concerning lands, within the 4th section of the 29 Car. 2, c. 3:—The court, on appeal, reversed his decision. *Kelly, App., Webster, Resp.,* 283

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1. A vicar choral of St. Paul's Cathedral is not entitled, *during his year of probation*, to share in a fine paid on the renewal of a lease by the dean and chapter and vicars choral, of an estate which is one of the sources of the emoluments enjoyed by such vicars choral. *Shoubridge v. Clark*, 335
2. Had he been entitled, money had and received would, it seems, have been the proper form of action to recover it,—either against all the other vicars choral, or against the pittansary, the person intrusted with the collection and distribution of the funds. *Id.*

**VOID SPACES.***Rateability of,—See PAVING ACTS.***WARRANT OF CONSIDERATION.***See PLEADING, II. 2.***WARRANT OF ATTORNEY.***I. Attestation of.*

1. A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney:—The court set it aside. *Cooper v. Grant*, 154
2. In such a case, the court will not impose upon the defendant the terms of bringing no action. *Id.*

*II. Entering up Judgment on.*

1. Upon a motion to enter up judgment on an old warrant of attorney, the affidavit is properly intituled in the cause in which the judgment is to be entered. *Bell v. Fisk*, 493
2. Where a warrant of attorney is given to the three trustees of a joint-stock bank, to secure a debt due to the copartnership, the judgment thereon is properly entered up in the name of the public officer for the time being. *Id.*

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- I. *Cases decided upon Statutes anterior to the REFORM ACT, 2 W. 4, c. 45.*

8 H. 6, c. 7.—*Charge upon Land.*

1. *Mortgage.*—A party's qualification to vote was described to be in respect of freehold land in C., which was proved to be of the yearly value of 5*l.* It appeared, however, that this land, with other land belonging to the voter (the case not showing of what description or where situate) of the yearly value of 50*l.*, was mortgaged for 300*l.*, and that the interest on the mortgage was 15*l.* a year:—Held, that the voter had a freehold estate in C., of a sufficient value to entitle him to be on the register. *Moore, App., The Overseers of Carisbrooke, Resp.,* 661
2. *Rent-charge.*—The owners of a piece of land which was held by them subject to a rent-charge of 14*l.* 1*s.* 7*d.* per annum, conveyed a portion of it to eight persons, as tenants in common in fee, subject to the payment of 4*l.* 5*s.* per annum as their proportion of the rent-charge,—the grantors covenanting to pay the remainder themselves, or to indemnify the grantees therefrom, and reserving to the latter power to distrain upon the rest of the land for any excess of the rent-charge which they might be compelled to pay. It was ad-

mitted that the residue of the land was of sufficient value to satisfy the portion of the rent-charge so agreed to be paid thereout:—Held, that, although in point of law the land so conveyed was liable to the whole rent-charge of 14*l.* 1*s.* 7*d.*, yet, for the purpose of the elective franchise, the interest of the eight grantees was to be taken to be, the value of the land conveyed to them, after deducting the proportion only of the rent-charge covenanted to be paid by them. *Barrow, App., Buckmaster, Resp.,* 664

3. *Estate of "uncertain Duration."*—By a local act, 8 & 9 Vict. c. vi., the resident freemen of a borough were empowered to elect from their body a certain number of deputies to act for them in the management of "the freemen's allotments;" and the 8th section of the act empowered the deputies to divide certain of the lands into small allotments among the resident freemen desiring to become occupiers thereof at a small annual rent,—"*the allotments to be held respectively by each resident freeman desiring to become the occupier obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies.*" By subsequent sections, the lands in question were vested absolutely in the deputies for the time being, in trust for the resident freemen, with power to sell the same, with the consent of the major part of the freemen assembled at a meeting convened for that purpose; and a power of re-entry was reserved to the deputies, in case any freeman should be in arrear of rent for his

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allotment for fourteen days, or should fail to conform to the provisions of the act, or the rules to be made by the deputies:—Held, that each allottee had a freehold estate "of an uncertain duration," in his allotment, which entitled him to vote in the election of members for the borough. *Beeson, App., Burton, Resp.,* 647

4. *Value Reduced by Cost of Repairs.*—A. was registered as a county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of 75*l.* 15*s.*, with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63*l.* 3*s.* 7*d.*, and there was a further charge of 1*l.* 6*s.* for expenses of collection. The average annual expenses of repairs, which were done by the landlords, and which the revising barrister found were necessary to enable them to obtain the net rent of 63*l.* 3*s.* 7*d.*, had for the preceding six years been 4*l.* per annum. The revising-barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was of less than the value of 40*s.* by the year, and he expunged his name from the list:—Held, that he had correctly decided. *Hamilton, App., Bass, Resp.,* 631

II. *Cases decided upon the Construction of the REFORM ACT, 2 W. 4, c. 45.*

*Section 27.—Sufficiency of Qualification.*

1. *House and Garden.*—A party who occupies a house, and a garden not immediately adjoining the house, but both occupied by him as tenant under the same landlord, and at one entire rent exceeding 10*l.* per annum, is entitled, under the 2 W. 4, c. 45, s. 27, to be registered in respect thereof. *Collins, App., Thomas, Resp.,* 639

2. *Payment of Taxes.*—Assessed taxes are (by the 43 G. 3, c. 161, s. 23) payable quarterly, though, by the 48 G. 3, c. 141, the collectors are directed to collect them, and they are accordingly usually collected half-yearly.

Where, therefore, a house-tax was payable on the 20th of December, 1851, but not demanded until the 11th of April, 1852, and the party assessed did not pay it until after the 20th of July:—Held, that he had not, within the meaning of the 11 & 12 Vict. c. 90, "paid, on or before the 20th of July, all assessed taxes which became payable from him in respect of the premises previously to the 5th of January," and consequently that he was not entitled to be registered. *Smedley, App., Ford, Resp.,* 622

III. *Cases decided upon the Construction of the REGISTRATION ACT, 6 & 7 Vict. c. 18.*

*Section 7.—Notice of Objection to County Voter.*

*Description of List.*—A notice of objection to a county voter, under the 6 & 7 Vict. c. 18, s. 7, in the following form,—"Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts,"—Held, a sufficient compliance with Sched. A. No. 5, there being no other list to which the notice could apply than the list of county voters. *Lambert, App., The Overseers of St. Thomas, New Sarum, Resp.,* 642

*Section 17.—Notice of Objection to Borough Vote.*

*Description of List.*—A notice of objection to a party's right to vote in the election of members for the city of C., described the objector as being "on the list of freemen for the city of C." There are several townships in C., the overseers of which severally make out and publish lists of persons entitled to vote in respect of occupation; and there is also a list made out and published by the town clerk, which is intitled "The list of freemen of the city of C., entitled to vote in the election of members for the said city." Under the municipal corporation act, 5 & 6 W. 4, c. 76, s. 5, the town clerk also makes out and keeps (but does not publish) a list of the freemen of the city, called "The freemen's roll."—Held, by Jervis, C. J., Williams, J., and Talfourd, J. (dissentiente Maule, J.), that the above notice of objection was a sufficient compliance with the 6 & 7 Vict. c. 18, s. 17, inasmuch as any person reading it must understand that the objector intended to state that his name was on the list of freemen entitled to vote in the election of members. *Feddon, App., Savyers, Resp.,* 680

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